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[SONG ENDS] - Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics

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# [SONG ENDS] – Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics

John F. Stanton\*

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## INTRODUCTION

In a moment of nostalgia, you decide to purchase a DVD or Blu-Ray disc of *The Wizard of Oz*.<sup>1</sup> You heat up some popcorn at home, insert the disc, and push “play.”

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<sup>1</sup> “DVD” stands for Digital Video Disc. “Blu-Ray” is essentially a DVD with advanced capacity for image storage. For the early part of the 21st Century, DVDs and Blu-Rays comprised the dominant form of the home entertainment market. *See, e.g.,* Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 310-11 (S.D.N.Y. 2000) (discussing growth of DVD markets). For purposes of this article, the distinctions between DVDs and Blu-Rays are immaterial. Accordingly, I will refer to both collectively as “DVDs” out of convenience.

Some fifteen minutes into the film, you anticipate enjoying Judy Garland singing the iconic song “Over the Rainbow.”

Much to your chagrin, you discover that Garland’s voice has been cut off during the song sequence, and you can only watch Garland “mouth” the lyrics without hearing her vocalize any of the song’s words. Once the song ends, normal audio resumes for the spoken dialogue. You become even angrier when you learn that the audio switches “off” again for all songs in the movie.

You decide to call the DVD producer to complain. A customer service representative thanks you for your call and explains why the song lyrics were not included in the DVD. She says that song lyrics are subject to separate copyrights, and the DVD producer did not possess the necessary license to include the lyrics on the DVD. So instead, you “watch” Garland, Ray Bolger, the Munchkins, and the rest of the movie’s cast “sing” their song numbers without hearing the lyrics and only hear the actors speaking the movie’s normal dialogue.

If you think it is nonsensical to produce a DVD that omits song lyrics because the producer did not have the copyright licenses to the lyrics, then you should feel the pain of the deaf and hard of hearing community. Far too often, that is the reality for deaf viewers.<sup>2</sup> Since DVDs became popular, a movie or television show will caption the actors’ dialogue, but they will not caption any song lyrics played throughout the feature presentation (be it during the opening and closing credits or during the feature). If the movie is a musical in which the songs are integral to the storyline, the lack of captions for the songs hinders deaf viewers from understanding the storyline.

Much scholarship exists on the topic of making movies and television programming accessible for deaf viewers through captioning.<sup>3</sup> This article will focus on a

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<sup>2</sup> For simplicity’s sake, references to “deaf individuals,” “deaf viewers,” or “deaf consumers” in this article encompass all individuals whose hearing loss prevents full enjoyment of an uncaptioned movie or television show. Cf. *Ball v. AMC Entm’t, Inc.*, 246 F. Supp.2d 17, 19 n.1 (D. D.C. 2003) (utilizing similar nomenclature).

<sup>3</sup> See, e.g., KAREN PELTZ STRAUSS, *A NEW CIVIL RIGHT: TELECOMMUNICATIONS EQUALITY FOR DEAF AND HARD OF HEARING AMERICANS*, 205-72 (2006); Reid, *Third Party Captioning and Copyright*, in *THE GLOBAL INITIATIVE FOR INCLUSIVE INFORMATION AND COMMUNICATION TECHNOLOGIES* (2014), available at <http://ssrn.com/abstract=2410661>; Virginia Wooten, Comment, *Waiting and Watching in Silence: Closed Captioning Requirements for Online Streaming Under National Association for the Deaf v. Netflix, Inc. and the CVAA*, 14 N.C. J.L. & Tech. ON. ED. 135 (2012); Daniel Haney, Note, *Disability Law—Americans with Disabilities Act of 1990—Title II and Title III and the Expansion of Captioning for the Deaf: From Televisions and Movie Theaters to Stadiums And Arenas?*, 33 U. ARK. LITTLE ROCK L. REV. 465 (2011); Michael S. Stein, Casenote, *District Court Approves Settlement Requiring Movie Theaters to Provide Closed Captioning for Deaf and Hard of Hearing People: Ball v. AMC Entertainment, Inc.*, 118 HARV. L. REV. 1777 (2005); Faye Kuo, Comment, *Open and Closed: Captioning Technologies as a Means to Equality*, 23 J. MARSHALL J. COMPUTER & INFO. L. 159 (2004); Sy Dubow, *The Television Decoder Circuitry Act – TV for All*, 64 Temple L. Rev. 609 (1991); Melissa F. Widdifield, Symposium Comment, *Cable and Television: Access of the Hearing-Impaired to Television Programming*, 5 Loy. L.A. ENT. L. REV. 165, 188-97 (1985); Ann P. Michalik, Casenote, *The Public Interest Standard in the Communications Act and the Hearing Impaired: Community Television of Southern California v. Gottfried* (103 S. Ct. 885), 25 B.C. L. Rev. 893 (1984); Thomas W. Fothergill, Comment, *Community Television of Southern California v. Gottfried* (103 S. Ct. 885): *Defining the Role of the Television Industry in Serving the Needs of the Hearing Impaired*, 19 New Eng. L. Rev. 899 (1983-84); Schwartz & Woods, *Public Television and the Hearing Impaired*, 9 J.C. &

specific question: are movie and television producers on firm legal ground by invoking copyright as a basis for refusing to caption song lyrics?<sup>4</sup>

The answer is a resounding “no.” Even assuming that the copyright defense was ever tenable in these circumstances, at least two recent cases from federal courts—one each at the district and circuit court level—led to the inevitable conclusion that studios and stations cannot in good faith make a “copyright defense” for failing to caption song lyrics.<sup>5</sup> This article will give a comprehensive answer that hopefully will end the practice of not captioning song lyrics so that deaf viewers have full access to feature presentations.<sup>6</sup>

## I. THE NATURE OF THE PROBLEM

To make a movie or television show accessible to deaf viewers, the producer must provide captions that allow the deaf person to “hear” the program’s spoken words by reading them.<sup>7</sup> This includes captioning the songs.<sup>8</sup> There should not be

U.L. 1 (1982-83); Comment, Gottfried v. FCC: *The Public Interest Standard and Broadcaster Responsibility to the Hearing-Impaired*, 130 U. PA. L. REV. 957 (1982); Julie Heldman, Comment, *Television and the Hearing Impaired*, 34 FED. COMM. L. J. 93 (1982); Robert L. Corn, Note, *Judicial Intervention for the Hearing Impaired: An Uneasy Partnership Between the Federal Communications Commission and the United States Court of Appeals for the District of Columbia Circuit*, 31 Cath. U. L. Rev. 699 (1982).

<sup>4</sup> To the best of my knowledge, to this date, only two articles have specifically examined the relationship between captioning and copyright in legal scholarship. See Reid, *supra* note 3, at 8-23; Wooten, *supra* note 3 at 150-61. The idea to write this article came from email exchanges I had with Professor Reid after a deaf viewer complained to me that Netflix was refusing to caption the lyrics to the opening song for *Orange is the New Black*, ostensibly because it lacked the copyright to do so. ORANGE IS THE NEW BLACK (Netflix 2013).

<sup>5</sup> See Feldman v. Pro Football, Inc., 579 F. Supp.2d 697 (D. Md. 2008), *aff’d*, 419 Fed. App’x. 381 (4th Cir. Mar. 25, 2011) (discussed *infra* notes 92-97 and accompanying text); Authors Guild, Inc., v. HathiTrust, 902 F.Supp.2d 445 (S.D.N.Y. 2012), *aff’d in part, vacated in part, and remanded*, 755 F.3d 87 (2d Cir. 2014) (discussed *infra* notes 125-55 and accompanying text).

<sup>6</sup> When I informed my deaf friends that I was working on an article regarding the lack of captioned song lyrics in movies and television shows, many of them responded with great enthusiasm. It was clear that this was an issue that had greatly angered the deaf community, and they want it resolved.

<sup>7</sup> See, e.g., Ariz. ex rel. Goddard v. Harkins Amusement Enterprises, Inc., 603 F.3d 666, 668 (9th Cir. 2010) (noting necessity of captions or subtitles for deaf viewers to understand a movie); see also Gottfried v. FCC, 655 F.2d 297, 315 (D.C. Cir. 1981) (“Because of the national policy of extending increased opportunities to the hearing impaired, we believe that some accommodations [i.e., captions] for the hard of hearing are required of commercial stations, under the general obligation of licensees to serve the public interest, convenience, and necessity”) (quotations omitted), *rev’d in part on other grounds*, 459 U.S. 498 (1983); Kuo, *supra* note 3 at 169 (“There is no dispute that captions, which are text versions of sound and voice, are absolutely necessary for deaf people to gain communication access to aural medias, such as the television, . . . and film”); Schwartz & Woods, *supra* note 3 at 4 (access to captioned television “does bear an important relationship to the goal of effectively integrating the handicapped into today’s society”).

<sup>8</sup> Even if deaf viewers do not (or cannot) enjoy music as much as their hearing counterparts, captioning industry “best practices” guidelines dictate that efforts should be made to convey a song’s melody to the deaf viewer. See, e.g., THE CBC CAPTIONING STYLE GUIDE: GENERAL GUIDELINES FOR OFF-LINE ROLL UP AND POP-ON CAPTIONS at 18 (2003), available at <http://www.dcmp.org/caai/nadh218.pdf> (“Music styles are indicated in the same manner as sound effects. Examples - [theme music], [marching band plays], [bagpipes played poorly]”).

any question that deaf viewers can enjoy a song's lyrics as much as their hearing counterparts.<sup>9</sup>

While it is true that some songs are arguably expendable in movies or shows, more often than not, the producers included the songs for a reason.<sup>10</sup> Among many other purposes, songs can explain the premise of the show,<sup>11</sup> set the tone or mood for the show,<sup>12</sup> provide for comic value,<sup>13</sup> show romance,<sup>14</sup> provide political commentary,<sup>15</sup> set up a pivotal point,<sup>16</sup> or explain surrounding historical events better than ordinary dialogue ever could.<sup>17</sup>

I, myself, have been deaf since early childhood. From my own personal experience, the practice of not captioning song lyrics in movies or shows is a relatively recent phenomenon. I do not have any statistics to support my observation. But I have asked many deaf colleagues anecdotally if they have noticed the same pattern. Most responded in the affirmative.

In the end of the twentieth century, very rarely (if ever) did a producer refuse to caption song lyrics in a show or movie—be it on television, in a theater, or on a

<sup>9</sup> See, e.g., Haney, *supra* note 3 at 488 (“It is the act of communication and understanding that both hearing and deaf individuals have access to; therefore, their communicating is essentially equal. The same can be true about the access to the words spoken or sung at a live-entertainment event. The hearing rely on their ears while the deaf rely on their eyes, yet both could understand the words spoken or sung when put in their respective mediums.”).

<sup>10</sup> See *infra* note 96 and accompanying text. Indeed, a court recognized that song lyrics are usually an essential component of the consumer experience. See *id.*

<sup>11</sup> “The Ballad of Gilligan’s Isle” explains to new viewers how seven people ended on a deserted Pacific island on the television show *Gilligan’s Island*. SHERWOOD SCHWARTZ & GEORGE WYLE, THE BALLAD OF GILLIGAN’S ISLE (EMI U 1964); GILLIGAN’S ISLAND (United Artists Television 1964-67).

<sup>12</sup> Any number of examples can make the point. See, Dolly Parton’s “Working 9 to 5” from the movie *9 to 5*, Kenny Loggins’ “Highway to the Danger Zone” from *Top Gun*, the North Star Camp Kids Chorus’ “Are You Ready for the Summer?” from *Meatballs* would all qualify. DOLLY PARTON, WORKING 9 TO 5 (RCA Studios 1980); KENNY LOGGINS, DANGER ZONE (Columbia Records 1986); NORTH STAR CAMP KIDS CHORUS, ARE YOU READY FOR THE SUMMER (RSO Records 1979).

<sup>13</sup> Who doesn’t crack up at “Knights of the Round Table” from *Monty Python and the Holy Grail*? MONTY PYTHON, KNIGHTS OF THE ROUND TABLE (CAMELOT SONG) (Arista 1975).

<sup>14</sup> The reader can select his or her favorite here. I will provide Whitney Houston’s “I Will Always Love You” from *The Bodyguard* as an example. WHITNEY HOUSTON, I WILL ALWAYS LOVE YOU (Arista 1992).

<sup>15</sup> While watching the film *Fahrenheit 9/11*, partisan Democrats undoubtedly doubled over in laughter and partisan Republicans undoubtedly howled in disapproval when Michael Moore used the song “Believe It or Not” from the television show *The Greatest American Hero* while showing President George W. Bush landing on the aircraft carrier Abraham Lincoln to give the now infamous “Mission Accomplished” speech. FAHRENHEIT 9/11 (Dog Eat Dog Films 2004).

<sup>16</sup> Kirk Douglas’ singing “A Whale of a Tale” in *20,000 Leagues Under the Sea* comes to mind. Douglas’ character sings the song to his shipmates’ amusement at pass the time on their voyage. When he finishes, the ship immediately encounters the nefarious submarine Nautilus and is sunk. 20,000 LEAGUES UNDER THE SEA (Walt Disney Productions 1954).

<sup>17</sup> The unidentified Nazi Youth singing “Tomorrow Belongs to Me” in *Cabaret*’s beer garden scene encapsulates how the Third Reich was able to achieve power in Germany in the 1930s in a mere two and a half chilling minutes. CABARET (Allied Artists Pictures 1972).

Video Home System (“VHS”) tape.<sup>18</sup> It was not until DVDs became popular in the late 1990s and early 2000s when captions started to disappear from song lyrics.<sup>19</sup> Instead, many (albeit not all<sup>20</sup>) DVDs either omitted captions altogether when a song began to play, or instead simply stated something like “[SONG PLAYING]” and the oh-so-helpful “[SONG ENDS]” instead of providing captioned lyrics.<sup>21</sup>

To give one example, I can attest that every James Bond movie captioned in the theater, on television, or on a captioned VHS tape, captioned the title song (both in the opening and closing credits) and any additional songs played in the movie. Yet, when the same movie was released on DVD, the songs would not be captioned.<sup>22</sup> The same phenomenon happened when some musicals were released on DVD.<sup>23</sup> Although I have seen fully captioned versions of the movies *Fiddler on the Roof* and *Hair* on television and VHS, I have also seen DVDs of those films in which none of the songs are captioned.<sup>24</sup> Failing to caption the songs in those instances rendered the DVD nearly worthless to me.<sup>25</sup> Television shows released on DVD are encountering the same issue. For example, when *The Big Bang Theory* airs on CBS, and in syndicated re-runs on TBS, the opening song of the same title from the Barenaked

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<sup>18</sup> As noted *supra* note 3, much has been written about the history of captioning in movies and television. Other than two very recently written articles, *see supra* note 4, not a single one of those authors raised the issue of copyright infringement. Several of the authors of the papers cited in note 3 were involved in captioning efforts through litigation, legislation or the regulatory process. If those authors had encountered any potential copyright issues in their captioning advocacy experiences, they surely would have said so in their articles.

<sup>19</sup> To the best of my knowledge, nobody ever kept formal statistics regarding which studios stopped captioning song lyrics when the DVD era began. Part of the problem may have been that deaf viewers simply did not realize that they were missing an uncaptioned song. As such, there were few complaints regarding the omissions. For purposes of this article, all I can offer as factual support regarding the lack of captioning of song lyrics are my own personal observations.

<sup>20</sup> My use of *The Wizard of Oz* DVD in the introductory section of this article was unfair. The DVD producer captioned all song lyrics in that movie. *See* THE WIZARD OF OZ DVD (MGM released Oct. 19, 1999).

<sup>21</sup> Alternatively, the producers will just caption “[SINGING AIN’T NO MOUNTAIN HIGH ENOUGH]” instead of the actual lyrics when the song is performed. This happens rather often. *See, e.g.*, GUARDIANS OF THE GALAXY (Marvel Studios 2014); SILVER LININGS PLAYBOOK (The Weinstein Co. 2012); CARS (Walt Disney Pictures 2006); MAJOR LEAGUE (Paramount Pictures 1989).

<sup>22</sup> *Compare, e.g.*, A VIEW TO A KILL VHS (United Artists 1986) with A VIEW TO A KILL DVD (MGM/UA released 2000).

<sup>23</sup> *See infra* notes 24-25 and accompanying text.

<sup>24</sup> *See* FIDDLER ON THE ROOF DVD (The Mirisch Company released June 30, 1998); HAIR DVD (United Artists released Apr. 27, 1999).

<sup>25</sup> Some of my deaf colleagues have had similar frustrating experiences. I have been told that the DVDs to the movies *Magic Mike*, *The Fault in our Stars*, *Begin Again*, *Country Strong*, *Led Zeppelin: The Song Remains the Same* and *Gimmie Shelter* caption the dialogue, but not the song lyrics. MAGIC MIKE (Iron Horse Entertainment 2012); THE FAULT IN OUR STARS (Temple Hill Entertainment 2014); BEGIN AGAIN (Sycamore Pictures 2013); LED ZEPPELIN: THE SONG REMAINS THE SAME (Swan Song 1971); GIMMIE SHELTER (Day Twenty-Eight Films 2013).

Ladies is captioned.<sup>26</sup> Yet when the show was released on DVD, the song was not captioned.<sup>27</sup>

There is even captioning variation over individual songs on DVDs. For example, Paul McCartney's song "Live and Let Die" is not captioned when it played in the title sequence for the DVD of the 1973 James Bond movie of the same name.<sup>28</sup> Yet the song is captioned when Jennifer Lawrence's character sings it in the DVD of 2013's *American Hustle*.<sup>29</sup>

In some instances, it appears that the producers do not believe captioning the song is necessary.<sup>30</sup> Other times (at least in the television context), the producers may not decide on a particular song to be used in the background for scene or the closing credits until the last minute, and the captioning company simply does not have time to create the captions before the show airs.<sup>31</sup> Of course, time constraints do not account for the failure to caption song lyrics in the DVD context.

I have a theory as to why studios began the practice of not captioning song lyrics in the DVD era. However, before I discuss it, more background to both caption accessibility and to copyright law may be necessary.<sup>32</sup>

<sup>26</sup> See generally *The Big Bang Theory* (CBS 2007-15).

<sup>27</sup> See generally *The Big Bang Theory*, DVD Seasons 1-7 (CBS 2007-14). There is at least one instance where hearing viewers can sympathize with lack of access to songs. The television show *WKRP in Cincinnati*, which aired on CBS from the late 1970s to early 1980s, gained critical acclaim for its use of popular songs that were relevant to episodes' particular plotlines. However, when the show was released on DVD in the mid-2000s, the producers were unable to reach an agreement with the song copyright holders to use the songs. See Kiesewetter, *Next 'WKRP' DVDs Will Include Original Rock Music*, *Cincinnati Enquirer* (June 6, 2014) available at <http://www.cincinnati.com/story/tvandmediablog/2014/06/06/wkrp-in-cincinnati-howard-hesseman-loni-anderson-tim-reid-shout-factory-vietnam-war/10019209/>. Instead, the producers either cut out songs entirely on the DVD, or substituted generic music for the original songs. Fans of the show believed that not including the original songs greatly diminished the quality of the show. See *id.* ("In 2007, Fox Home Entertainment released the first season with generic rock replacing the 1970s hit songs because of the high cost for the music rights, to the disappointment of many fans"); see also Netflix Member Reviews of *WKRP in Cincinnati* (visited Sept. 15, 2014) ("DO NOT RENT THIS!!!! They are HIGHLY EDITED and the music has been taken out and replaced with generic [expletive]. The music in this show wasn't background noise, it was part of the show") (top rated comment); *id.* ("The funniest sitcom ever – totally ruined by rampant greed. NONE of the original music is included because they STILL didn't want to pay royalties to use it. Going from classic 70s rock to canned studio tracks destroys the entire feel of the series. To make matters worse, the music was an integral part of MANY of the jokes, so you get weird punchlines that make no real sense of any kind") (third top rated comment). Deaf viewers feel like this all the time when songs aren't captioned.

<sup>28</sup> See *LIVE AND LET DIE DVD* (MGM/United Artists released Oct. 19, 1999).

<sup>29</sup> See *AMERICAN HUSTLE DVD* (Atlas Entertainment released Mar. 18, 2014).

<sup>30</sup> The theme song to the television show *Modern Family* is not captioned in the show's syndicated re-runs on the Fox or USA channels. Of course, the "song" simply repeats the words "Hey, hey!" several times. If there is a relation of these "lyrics" to the plot of the show, it is lost on me. *MODERN FAMILY* (20th Century Television 2009). In addition, many shows and movies play songs over their closing credits without captioning the song's lyrics. See, e.g., *IRON MAN* (Marvel Studios 2008).

<sup>31</sup> August 7, 2014 Email from David Davis to author (on file with author) (listing *CSI* and *Cold Case* as two of many examples where producers were routinely late in providing captioning company with songs to insert into shows). Of course, to the extent that these programs are governed by FCC regulations, this would not be a valid defense for a lack of captioning. See *infra* notes 76-77 and accompanying text.

<sup>32</sup> For those who already are well-familiar with both accessibility and copyright law, or who otherwise



## II. HISTORICAL AND LEGAL BACKGROUND TO CAPTIONING

### A. *Basic Captioning Explanations*

Captions tell a deaf viewer what is being heard on screen in a movie or television show.<sup>33</sup> Captions are somewhat different from English “subtitles,” as captions will convey aural information beyond the movie or show’s dialogue, such as “telephone ringing” or “explosion.”<sup>34</sup> Captions are usually listed as some variation of “Subtitles for the Deaf and Hard of Hearing” on DVDs or online streaming.<sup>35</sup>

With rare exceptions, captions transcribe dialogue from movies on a word-for-word basis.<sup>36</sup> For this reason, courts have rejected claims that captions alter the content of a movie or show from entities seeking to avoid providing captioning.<sup>37</sup> The U.S. Department of Justice filed a brief in 2009 asserting that closed captioning “in no way alter[s] a theater’s service (i.e., screening movies) for persons without sensory disabilities.”<sup>38</sup> Congress apparently agrees with this position as well.<sup>39</sup>

Movie and television producers have historically been reluctant to caption their features.<sup>40</sup> Because of tireless advocacy on the part of deaf consumers, and increased legal mandates, most movies and shows are captioned today.<sup>41</sup> Industry best prac-

don’t wish to be kept in suspense, *see infra* notes 166-92 and accompanying text for my guess as to why studios stopped captioning song lyrics when the DVD era began.

<sup>33</sup> *See, e.g., Ball*, 246 F. Supp.2d at 20 n.9 (“Captions are textual descriptions of a film’s soundtrack, comprised of the dialogue and descriptions of other sounds”).

<sup>34</sup> *See, e.g., Kuo, supra* note 3, at 170-71 (making point).

<sup>35</sup> *See, e.g., WIZARD OF OZ DVD, supra* note 20.

<sup>36</sup> *See, e.g., Wooten, supra* note 3 at 151 (noting that captions occasionally differ from spoken script).

<sup>37</sup> *See, e.g., Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002) (noting that captioning, unlike video description for blind patrons, does not change program content); *see also Gottfried*, 655 F.2d at 312 n.54 (rejecting broadcast stations’ argument that compelling captioning would violate their First Amendment rights because “[a] captioning requirement would not significantly interfere with program content”); *Ball*, 246 F. Supp.2d at 21 n.11 (rejecting movie theaters’ “fundamental alteration” defense in ADA suit because captioning does not alter content of movie).

<sup>38</sup> Brief of United States as Amicus Curiae Supporting Appellants and Urging Reversal at 30, *Arizona v. Harkins Amusement Enters.*, 603 F.3d 666 (9th Cir. 2010), available at <http://www.justice.gov/crt/about/app/briefs/azharkins.pdf>; *accord Kuo, supra* note 3 at 197 (“The movie product is not itself altered in any way, shape or form when [captioning] is used”).

<sup>39</sup> In opposing the passage of the Television Circuitry Decoder Act in 1996 (*see infra* notes 72-73 and accompanying text), Congress considered and presumably rejected the television industry’s contention that captioning requirements would violate their First Amendment rights. *See Strauss, A NEW CIVIL RIGHT, supra* note 3, at 251-52, 54 & n.28 (describing legislative background); *see also Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications & Video Accessibility Act of 2010*, 77 Fed. Reg. 19480-01, 19486 (Mar. 30, 2012) (“As an initial matter, closed captioning requirements implicate the First Amendment only marginally at best”). CNN nonetheless made a “First Amendment” defense to a captioning lawsuit, and it was not successful. *See Greater L.A. Agency on Deafness, Inc. v. CNN*, 742 F.3d 414, 430-32 (9th Cir. 2014) (captioning requirements not prior restraint or an impermissible burden under First Amendment).

<sup>40</sup> *See infra* notes 45-55 and accompanying text.

<sup>41</sup> *See, e.g., Elekes, New Movie Theater’s Services are Welcome*, MYRTLE BEACH SUN-NEWS (April 28, 2008) (“According to the Motion Picture Association of America, more than 100 [captioned] first-run



tices among third party captioning companies dictate that “[I]yrics must be written out for songs.”<sup>42</sup>

### B. *The Inaccessibility Issue*

The earliest movies provided full accessibility for deaf individuals, as the dialogue was printed on the screen and visible to the entire audience.<sup>43</sup> The era of “silent” films effectively ended in 1927, when *The Jazz Singer* (a “talking” movie) was a commercial success.<sup>44</sup>

In the decades that followed, deaf individuals were largely excluded from the social, cultural, and emotional experience of movies.<sup>45</sup> Dr. Edmund Burke Boatner, the longtime superintendent of the American School for the Deaf in Connecticut, described this feeling of exclusion in 1947 when he took the school’s basketball team to see an uncaptioned movie:

I recall that the movie was “The Son of Monte Christo.” As I watched the boys’ reactions, I could see the looks of bafflement on their faces. In one scene, for example, a group of men were casually sitting around a table talking when suddenly they jumped up and started in at one another with their swords. Why? Our boys couldn’t see any reason for such behavior; they hadn’t heard the conversation. It was then that I made a resolution to see that understandable films were provided for the deaf. Obviously, there should be films with captions, but how were they to be made?<sup>46</sup>

For a long time, studios made no effort to make their “talking” features accessible to deaf viewers.<sup>47</sup> Deaf consumers complained about inaccessibility, but to no

movies are expected to be released by the major studios this year”).

<sup>42</sup> See THE CBC CAPTIONING STYLE GUIDE, *supra* note 8, at 18; accord FCC Release, *Closed Captioning on Television* (Feb. 20, 2014) (“Best practices for video programmers and captioning vendors are included in the rules . . . which promise to improve captioning quality for viewers. For example, video programmers can provide . . . song lyrics”) available at <http://www.fcc.gov/guides/closed-captioning>; The Media Access Group at WGBH, *Captioning FAQ* (2002) (“Songs and jingles should be captioned verbatim”), available at <http://main.wgbh.org/wgbh/pages/mag/services/captioning/faq/sugg-styles-conv-faq.html>.

<sup>43</sup> See JOHN S. SCHUCHMAN, *HOLLYWOOD SPEAKS: DEAFNESS AND THE FILM AND ENTERTAINMENT INDUSTRY* 6 (1988) (“The silent film era represented the apogee of film viewing access for deaf people since it was the only time in the history of the industry that deaf individuals were comparatively equal members of the movie audience”), 21-22 (repeating point); Strauss, *supra* note 3 at 205 (similar); Edmund B. Boatner, *Captioned Films for the Deaf*, at 3 (1980), available at <http://www.dcmp.org/caai/nadh93.pdf>; see also Gail L. Kovalik, “*Silent*” *Films Revisited: Captioned Films for the Deaf*, 41 *LIBRARY TRENDS* 100, 101 (1992) (also making point), available at [http://www.academia.edu/2813582/The\\_rustle\\_of\\_a\\_star\\_An\\_annotated\\_bibliography\\_of\\_deaf\\_characters\\_in\\_fiction](http://www.academia.edu/2813582/The_rustle_of_a_star_An_annotated_bibliography_of_deaf_characters_in_fiction).

<sup>44</sup> Boatner, *supra* note 43 at 3.

<sup>45</sup> Kovalik, *supra* note 43 at 102 (talking movies made deaf individuals “further isolated from the culture of an American hearing society”).

<sup>46</sup> Boatner, *supra* note 43 at 3.

<sup>47</sup> See *id.* (“While the lack of understandable films was keenly felt by the deaf, American film producers did nothing to remedy the situation. . . .”); Schuchman, *supra* note 43, at 50 (“Despite their technical ability to do so, filmmakers refused to provide captioned summaries of the dialogue. . . .”).

avail.<sup>48</sup> As Professor Schuchman explained, “[g]iven the absence of political clout and the magnitude of resources required to convince the federal government and industry to do otherwise, the deaf community had no choice but to accept what was offered [i.e., virtually nothing].”<sup>49</sup>

Deaf actor Emerson Romero (the cousin of the more celebrated actor Cesar Romero) is credited with being the first innovator to attempt to caption “talking” films for deaf viewers in the late 1940s.<sup>50</sup> By the 1950s, an organization called Captioned Films for the Deaf was established and sought to caption movies through charitable contributions.<sup>51</sup> Far more help was needed, however, than the volunteer group could provide.<sup>52</sup>

Television was even worse.<sup>53</sup> Because the technology to caption television shows was more complicated than captioning technology was for movies, and because the federal government was of little assistance, virtually no television captioning occurred until the late 1970s.<sup>54</sup> The details of television captioning development have been extensively discussed elsewhere and I would refer anyone interested to these thorough articles for further reading.<sup>55</sup> For purposes of this article, it will suffice to say here that television programmers refused to caption their shows primarily because they believed that the market for deaf viewers was too small to justify the costs of captioning.<sup>56</sup>

<sup>48</sup> See SCHUCHMAN, *supra* note 43 at 43 (“The *New York Times* printed letters of complaint from deaf persons who demanded the return of the silent films, or at least the inclusion of captions on the talkies. . . .”); *see also* at 91 (similar letters of complaint directed to television stations in the 1950s and 1960s).

<sup>49</sup> *See id.* at 12; *see also id.* at 7 (“Conditioned to believe that it had no legal right to see such a film in a public theater, the deaf community did not complain very much. . . .”), 43 (“In 1930, most deaf persons simply reconciled themselves to the takeover by the talkies. . . .”).

<sup>50</sup> Kovalik, *supra* note 43, at 102-03; *see also* Reid, *supra* note 3 at 2; Boatner, *supra* note 43, at 3. Credit for attempting to overcome the inaccessibility barrier is also due to deaf actor Earnest Marshall, who produced several movies featuring all-deaf casts using sign language. *See* SCHUCHMAN, *supra* note 43 at 12-13, 18 & n.31. An example of one of Marshall’s films, entitled *It is Too Late*, can be seen on the Gallaudet University Library’s web page at <http://videocatalog.gallaudet.edu/?video=2454>.

<sup>51</sup> Kovalik, *supra* note 43, at 103; Boatner, *supra* note 43 at 3-4; Strauss, *supra* note 3 at 205-06.

<sup>52</sup> *See* Haney, *supra* note 3, at 469-70.

<sup>53</sup> *See* SCHUCHMAN, *supra* note 43, at 88 (noting that most early television was “meaningless” to the deaf community) (quotation omitted).

<sup>54</sup> DuBow, *supra* note 3, at 610; Comment, *Gottfried v. FCC*, *supra* note 3, at 966, 980 (“Advocates for the hearing-impaired would certainly share the view that little has been done for their constituents in the ascertainment and programming areas. . . .”); Michalik, *supra* note 3, at 913-14, 917-18 (FCC’s failure to mandate captioning in television doomed any hope for widespread captioning access); Widdifield, *supra* note 3 at 197 (urging federal government to become more aggressive in captioning); *see also* Haney, *supra* note 3 at 473 (“The equipment used for [television] captioning in the 1970s was anything but simple”); Schwartz and Woods, *supra* note 3 at 5-6 (television captioning technology in late 1970s and early 1980s was lacking).

<sup>55</sup> *See, e.g.,* Strauss, *A NEW CIVIL RIGHT*, *supra* note 3 at 205-72; Dubow, *supra* note 3 at 610-18; Haney, *supra* note 3 at 470-77; Note, *Television and the Hearing Impaired*, *supra* note 3 at 116-30, 149-60.

<sup>56</sup> *See, e.g.,* Reid, *supra* note 3 at 4; DuBow, *supra* note 3, at 612, 613; Haney, *supra* note 3 at 472-75; Comment, *Gottfried v. FCC*, *supra* note 3 at 965-67 & n.48; Michalik, *supra* note 3 at 913 (“Currently, broadcasters have not shown a willingness to accommodate the needs of the hearing impaired.

### C. *Legal and Technological Improvements Boost Captioning Access*

As Professor Schuchman observed, “it was not long before the deaf community leaders began to adopt the language and strategies of political and civil rights advocates” to address captioning accessibility.<sup>57</sup> The first law to address the lack of captioning issue was the Captioned Films Act.<sup>58</sup> Through this law, Congress appropriated federal funds to obtain films, provide captions for them, and distribute them through state schools for the deaf and other appropriate state agencies.<sup>59</sup> This act proved enormously popular in the deaf community, and Congress expanded the appropriations for captioning over time.<sup>60</sup>

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Commercial stations, interested in maximizing profits, are unwilling to invest in the technology necessary to serve the hearing impaired absent FCC adoption of a standard technology for captioning”); *Closed Caption on Major Network TV Programs Available in 1980*, Newsounds, Vol. 4 No. 3 at 3 (Mar./Apr. 1979) (“captioning was opposed by the major TV networks who claimed it was too expensive and that the audience was too small for the investment to be worthwhile”); *Whew! NBC Captions Continue “For the Time Being,”* Newsounds Vol. 7 No. 3 at 1 (April 1982) (NBC considered ending its nascent captioning efforts because of costs, but relented after outcry from deaf community).

Other reasons for the lack of captioning existed. For example, CBS refused to caption any of its programming in the 1980s because it ostensibly believed that existing captioning technology was limited and that the deaf community was better off waiting for improved captioning technology. See Schwartz & Woods, *supra* note 3 at 120, 155 (“CBS, protesting that it preferred to wait for the more sophisticated teletext technology, broadcast no captions at all. . . . As a CBS spokesman said in explaining the company’s nonparticipation in the [existing captioning] project: ‘We don’t want to be part and parcel of encouraging people to buy something that we know is already outdated’”); *CBS Holds Out on Captioning*, Newsounds, Vol. 5 No. 8 at 2-3 (Oct. 1980) (generally same); Strauss, *A NEW CIVIL RIGHT*, *supra* note 3 at 209, 211-12. I use the word “ostensibly” because the deaf community often has heard the proverbial “Just be patient because better technology is just around the corner” excuse to justify inaccessibility. See, e.g., *Cornilles v. Regal Cinemas, Inc.*, 2002 U.S. Dist. LEXIS 7025 at \*\*20-21 (D. Or. Jan. 3, 2002) (defendant theaters successfully convinced judge to dismiss movie captioning lawsuit because, *inter alia*, more advanced captioning technology was in the works). When years pass and the supposed “new technology” has yet to blossom, the deaf community becomes frustrated. See *Ball v. AMC Entm’t, Inc.*, 315 F. Supp.2d 120, 128 (D. D.C. 2004) (noting that deaf individuals were “tired of waiting” for movie theaters to provide captions voluntarily); Kuo, *supra* note 3 at 201 (criticizing the “wait for better technology” argument to delay accessibility for people with disabilities); Schwartz & Woods, *supra* note 3, at 115 n.123 (recounting protests of deaf community against CBS’s lack of captioning); *AGBAD Joins Others in Resolve to Promote Line 21 Captioning Systems*, Newsounds, Vol. 6 No. 4 at 3 (May 1981) (numerous deaf advocacy groups protested CBS’ decision to wait two or three more years for better captioning technology and not offer any captioned programming in the meantime). Moreover, as my colleague John Waldo told me, the fundamental flaw in the “better and cheaper technology is coming” argument is that it can be used in perpetuity as an excuse for not providing accessibility. See Email from John Waldo to author (dated Nov. 13, 2014) (on file with author).

<sup>57</sup> Schuchman, *HOLLYWOOD SPEAKS*, *supra* note 43, at 13.

<sup>58</sup> PUB. L. No. 85-905 (1958).

<sup>59</sup> See Strauss, *A NEW CIVIL RIGHT*, *supra* note 3, at 205-06; Schwartz & Woods, *supra* note 3 at 123; see also Boatner, *supra* note 43 at 8-10 (describing lobbying efforts for and passage of Captioned Films Act).

<sup>60</sup> See Schwartz & Woods, *supra* note 3 at 123-24 (noting point). In 1975, the Captioned Films Act was eventually subsumed into the Education of All Handicapped Children Act (later renamed the Individuals with Disabilities in Education Act). See *id.* at 124 n.160.

The first law to address the issue of accessibility for people with disabilities on a systematic basis was Section 504 of the 1973 Rehabilitation Act, which prohibited disability discrimination by the federal government and those receiving federal funding.<sup>61</sup> Deaf advocates attempted to use Section 504 to obtain increased television captioning in litigation, but those efforts were ultimately unsuccessful.<sup>62</sup> That being said, the Supreme Court acknowledged that under Section 504, “the public interest would be served by making television broadcasting more available and more understandable to the substantial portion of our population that is handicapped by impaired hearing.”<sup>63</sup>

Deaf advocates refused to give up and continued to push for captioning. They eventually had more success. As Karen Peltz Strauss, now a Deputy Chief at the Federal Communications Commission (“FCC”), put it, “[i]f the 1970s and 1980s were the decades of captioning exploration, the 1990s were the decade of captioning mandates.”<sup>64</sup> Because of improvements in both captioning technology and better coordination between studios and captioning providers, most prime time television programs from major broadcasters were captioned by the late 1980s.<sup>65</sup> Likewise, in the 1990s, technology made captioning a relatively simple process in movie theaters.<sup>66</sup>

Consumers would have to wait longer for legal mandates on captioning. Congress passed the Americans with Disabilities Act (“ADA”) in 1990, mostly to expand the reach of the Rehabilitation Act.<sup>67</sup> As noted by the Supreme Court, the ADA

<sup>61</sup> 29 U.S.C. § 794.

<sup>62</sup> See *Cnty. TV of S. Cal. v. Gottfried*, 459 U.S. 498 (1983) (reversing circuit court’s decision that Section 504 required commercial broadcasters to caption television programs for deaf viewers); *Greater L.A. Council on Deafness, Inc. v. Cnty. TV of S. Cal.*, 719 F.2d 1017 (9th Cir. 1983) (affirming district court’s determination that Section 504 does not require public broadcasters to implement open captions on their programming). For good summaries of these cases, see Strauss, *A NEW CIVIL RIGHT*, *supra* note 3 at 212-16; Widdifield, *supra* note 3, at 188-97. As Strauss remarks: “Although it was somewhat frustrating that the chain of Gottfried cases did not secure greater court victories, the cases undoubtedly contributed significantly to television access, both by bringing these issues into the spotlight, and by helping to shape the captioning debate. . . . Having come at a critical juncture in the development of captioning, the cases set the stage for captioning successes in the years to come.” Strauss, *A NEW CIVIL RIGHT*, *supra* note 3 at 216.

<sup>63</sup> *Gottfried*, 459 U.S. at 508.

<sup>64</sup> Strauss, *A NEW CIVIL RIGHT*, *supra* note 3, at 226.

<sup>65</sup> See *id.*; DuBow, *supra* note 3 at 611; Schuchman, *supra* note 43 at 7. The rest of television, however, was another story. See STRAUSS, *supra* note 3 at 226; DuBow, *supra* note 3 at 611; Schuchman, *supra* note 43 at 105-06.

<sup>66</sup> See, e.g., Kuo, *supra* note 3 at 194 (“Since 1990, movie studios have been willing to cooperate with the push for captioned movies; in fact, they appear to encourage it”); *id.* at 200 (“Movie studios have steadily increased the number of captioned movies over the years”). It was the universal adoption of digital sound, which provided cues that would synch the captions and the aural material, that simplified captioning. As John Waldo explained to me when he reviewed this paper, digital sound “made it possible to separate the captions from the physical print of the movie. Film prints are large and bulky, and expensive to ship and especially to store. Enabling captions to be made available without the need to obtain a separate print improved the economics enormously. Digital projection has taken this one step further, dramatically reducing the cost of closed captioning and enabling open captions to be demonstrated at no cost.” Email from John Waldo to author (Nov. 13, 2014) (on file with author).

<sup>67</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended

provides a “broad mandate,” and “one of the Act’s ‘most impressive strengths’ has been identified as its ‘comprehensive character.’”<sup>68</sup>

While the ADA was under debate, Congress considered captioning mandates that would require broadcasters to provide captioned programming and movie theaters to show captioned features.<sup>69</sup> Studios and theaters strongly opposed any captioning mandates on economic grounds.<sup>70</sup> The industries largely prevailed.

With respect to television, Congress instead enacted the Television Decoder Circuitry Act (“TDCA”),<sup>71</sup> which mandated that televisions be equipped with a “captioning chip” that enabled the viewer to “turn on” captions at the viewer’s discretion.<sup>72</sup> Advocates hoped that this would increase the potential market for captioned shows by including not only deaf viewers, but also viewers with moderate hearing losses (e.g., the elderly), young children learning to read, and persons who wished to learn English as a second language.<sup>73</sup>

With respect to movie theaters, the statutory text of the ADA was silent regarding captioning. But the House Report accompanying the ADA contained a statement that “[o]pen-captioning . . . of feature films playing in movie theaters, is not required by this legislation.”<sup>74</sup> The report, did, however, say that future technological “advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.”<sup>75</sup>

at 42 U.S.C. §§ 12101 et seq. and scattered sections of the Communications Act of 1934, 47 U.S.C.).

<sup>68</sup> PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001)(citations omitted).

<sup>69</sup> See DuBow, *supra* note 3, at 615 (television); Waldo, *supra* note 3, at 1038-39 (theaters); STRAUSS, *supra* note 3, at 228 (both).

<sup>70</sup> See DuBow, *supra* note 3, at 613-14 (citing statements from television broadcast officials objecting to mandatory captioning because of costs); *id.* at 615 (“The three major captioning services unanimously agreed, however, that the networks would strongly oppose any government mandates for closed-captioning. . . . A provision for mandatory captioning in the ADA would create major broadcast industry opposition to the ADA that might weaken its chances of passage.”); Waldo, *supra* note 3 at 1040 (“[T]he theaters believe that hearing audiences find open captions distracting and undesirable.”); Schuchman, *supra* note 43, at 102 (“In spite of occasional use of captions for foreign language dialogue in such films as *The Longest Day* and *Patton*, theatrical films and television have opposed the use of open captions with the rationale that general audiences dislike them”).

<sup>71</sup> Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960 (codified as amended at scattered sections of the Communications Act of 1934, 47 U.S.C.). For further discussion of the TDCA’s passage, see STRAUSS, *supra* note 3, at 230-41.

<sup>72</sup> See DuBow, *supra* note 3, at 616-18 (detailing requirements of built-in captioning decoders of the TDCA). Prior to the TDCA, deaf viewers had to buy a separate decoder that could activate any captions on their television. See *id.* at 612; Haney, *supra* note 3, at 471, 475.

<sup>73</sup> See DuBow, *supra* note 3, at 614-15 (making point).

<sup>74</sup> See Waldo, *supra* note 3, at 1039 (quoting H.R. Rep. No. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391). “Open captioning” means captions that are seen by the entire audience. “Closed captioning” means captions that are only seen by the deaf viewer. See, e.g., *Ball*, 246 F. Supp.2d at 20 n.9 (explaining difference); *Greater L.A. Council on Deafness*, 719 F.2d at 1019 (same); Michalik, *supra* note 3, at 895 n.26 (same); Corn, *supra* note 3, at 716 n.105 (same); Schwartz and Woods, *supra* note 3, at 6 & n.27.

<sup>75</sup> See Waldo, *supra* note 3, at 1039 (quoting H.R. Rep. No. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391).

The Telecommunications Act of 1996 (“1996 Act”) built upon the TDCA’s requirements by mandating full access to television programs through closed captioning.<sup>76</sup> The Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) expanded the 1996 Act’s captioning coverage to some television shows that were also made available to viewers via the Internet.<sup>77</sup>

Deaf plaintiffs utilized these laws to bring captioning suits against a variety of entertainment entities. As noted earlier, lawsuits brought under Section 504 against television stations were not successful.<sup>78</sup> But several lawsuits by deaf individuals (myself included<sup>79</sup>) and state attorney general complaints were brought in the late 1990s and 2000s against movie theaters under the ADA or state disability access laws arguing that theaters should install captioning equipment to make the movies accessible to deaf viewers.<sup>80</sup> These suits and complaints produced better results for the plaintiffs, and the Department of Justice is currently developing regulations that will specify the precise captioning access obligations of theaters.<sup>81</sup>

In addition, several suits were brought protesting lack of captioning access against DVD retail and Internet streaming companies.<sup>82</sup> The National Association of the Deaf reached a settlement with Netflix in one of these suits.<sup>83</sup>

The FCC’s regulations were unable to cover DVDs because of the FCC’s limited jurisdiction.<sup>84</sup> Likewise, the ADA only regulates places, not goods or in-

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<sup>76</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending 47 U.S.C. §§ 151-615b); see also 47 C.F.R. § 79.1 (implementing television captioning via FCC regulation). For further discussion of the 1996 Act’s passage, see STRAUSS, *supra* note 3 at 246-47.

<sup>77</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260 § 202(a)-(b), 124 Stat. 2751 (codified 47 U.S.C. § 613); 47 C.F.R. § 79.4 (2014) (requiring video programming that is closed captioned on television to be closed captioned when distributed via Internet protocol).

<sup>78</sup> See *supra* notes 62-63 and accompanying text.

<sup>79</sup> I was one of the “et als” in the *Ball et al. v. AMC Entm’t, Inc.* lawsuit. See Stein, *supra* note 3 at 1784 n.46.

<sup>80</sup> See generally Waldo, *supra* note 3 (providing an excellent history of these lawsuits).

<sup>81</sup> See U.S. Department of Justice, *Movie Theaters; Captioning and Audio Description: Nondiscrimination on the Basis of Disability by Public Accommodations* (Aug. 1, 2014), available at <http://www.regulations.gov/#/documentDetail;D=DOJ-CRT-2014-0004-0001>.

<sup>82</sup> See *Jancik v. Redbox Automated Retail, LLC*, 2014 WL 1920751 (C.D. Cal. May 14, 2014); *Cullen v. Netflix, Inc.*, 880 F. Supp.2d 1017 (N.D. Cal. 2012); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp.2d 196 (D. Mass. 2012).

<sup>83</sup> See Joe Mullin, *Netflix Settles with Deaf-Rights Group, Agrees To Caption All Videos By 2014*, ARSTECHNICA (Oct. 10, 2012, 7:45 PM), <http://arstechnica.com/tech-policy/2012/10/netflix-settles-with-deaf-rights-group-agrees-to-caption-all-videos-by-2014/>. The National Association of the Deaf undoubtedly brought suit in Massachusetts because of favorable First Circuit precedent that held the ADA applied to Internet businesses. See *Nat’l Ass’n of the Deaf*, 869 F. Supp.2d at 201-02 (citing *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, (1st Cir. 1994)). Similar suits were dismissed in California because Ninth Circuit precedent applied the ADA more restrictively. See *Cullen v. Netflix*, -- Fed. App. --, 2013 WL 140103 (9th Cir. April 1, 2015) (affirming dismissal of captioning lawsuit against Netflix because circuit precedent limited reach of ADA); *Jancik*, 2014 WL 1920751 at \*8 (similar result in suit against Redbox). For additional discussion of these cases, see Wooten, *supra* note 3 at 142-46.

<sup>84</sup> See, e.g., Reid, *supra* note 3, at 5-6 (noting that FCC regulations do not reach DVDs). The FCC’s regulations did, however, require DVD players to have captioning capability. See *id.* (noting point).



ventory.<sup>85</sup> Thus, the ADA does not apply to DVDs *per se*. But merely because federal law did not reach DVDs did not mean that DVD producers were immune from captioning lawsuits.

In the early 2000s, many (if not the overwhelming majority of) DVDs would only caption the feature presentation and not caption the “Bonus Materials” (i.e., previews, deleted scenes, and filmmakers’ interviews/commentaries).<sup>86</sup> In 2004, a deaf lawyer named Russ Boltz filed a class action in California state court against numerous studios based upon several California consumer statutory remedies.<sup>87</sup> The crux of Mr. Boltz’s Complaint was that DVD producers were engaging in misleading advertising by saying on DVD jacket covers that the DVD was “captioned,” when only the feature presentation (rather than the entire DVD) was accessible for deaf customers.<sup>88</sup>

Although the defendants in *Boltz* disputed liability and damages, the parties reached a settlement in 2006.<sup>89</sup> The studios agreed to either caption the Bonus Materials in their DVDs, or to make explicit on the DVD packaging that only the feature presentation was captioned.<sup>90</sup>

Amusingly, the *Boltz* settlement contained an exemption for the defendants with respect to song lyrics in the Bonus Materials. Under the settlement, the defendants were not required to caption portions “in which [the studio] does not have the legal right to caption lyrics for inclusion in Bonus Material because it does not own and/or control the publishing rights to the written lyrics.”<sup>91</sup> As will be explained later in this article, this exemption is illusory because studios indeed have the “legal right” to caption song lyrics.

#### D. *The Right to Captioned Song Lyrics*

The notion that captioning song lyrics was necessary for “equal access” for deaf individuals was recognized in *Feldman v. Pro Football, Incorporated*.<sup>92</sup> In *Feldman*,

<sup>85</sup> See, e.g., *Jancik*, 2014 WL 1920751 at \*4.

<sup>86</sup> See, e.g., First Amended Complaint, *Boltz v. Buena Vista Home Entertainment, Inc.*, No. BC 323842 (Cal. Super. Ct., L.A. Cty. filed April 29, 2006) at ¶ 19 (on file with author).

<sup>87</sup> See *Boltz v. Buena Vista Home Entertainment, Inc.*, No. BC 323842 (Cal. Super. Ct., L.A. Cty. filed Nov. 1, 2004).

<sup>88</sup> See *id.* at 1-2. The *Boltz* suit sought restitution, damages and injunctive relief alleging: (1) unfair competition in violation of Cal. Business and Professions Code § 17200 *et seq.*; (2) false advertising in violation of Cal. Business and Professions Code § 17500 *et seq.*; (3) breach of implied warranty of fitness in violation of Cal. Civil Code §§ 1792.1 and 1792.2 and Cal. Commercial Code § 2315; and (4) violations of the Consumers Legal Remedies Act, Cal. Civil Code § 1750 (a)(5). See *id.* at 8-12.

<sup>89</sup> See, e.g., Bloomberg News, *Studios Settle Suit Over DVD Closed-Captioning*, LOS ANGELES TIMES (June 1, 2006), available at <http://articles.latimes.com/2006/jun/01/business/fi-calbriefs1.3>.

<sup>90</sup> See *Boltz*, No. BC 323842; see also, e.g., Amended Agreement of Settlement, Compromise and Release, Apr. 19, 2006, at § 2.3 (settlement agreement entered Apr. 19, 2006 between *Boltz* plaintiff and defendants Buena Vista Home Entertainment, Inc., Warner Bros. Entertainment Inc., and Warner Home Video Inc.) (on file with author).

<sup>91</sup> See Amended Agreement of Settlement, *supra* note 90, at § 2.3(A)(iii)(3), (B)(iii)(2).

<sup>92</sup> *Feldman v. Pro Football, Inc.*, 419 Fed. Appx. 381, 381 (4th Cir. 2011).



deaf fans of the Washington Redskins brought suit under the ADA, claiming that the football team was not captioning its stadium's public address system, thus rendering any songs played during touchdown celebrations, halftime shows, and cheerleaders' dance routines inaccessible for deaf fans.<sup>93</sup> The defendants denied that the ADA required them to make aural information available to deaf fans.<sup>94</sup>

The district court ruled that the failure to caption the song lyrics denied the plaintiffs equal access to the defendants' games.<sup>95</sup> The Fourth Circuit affirmed:

Music played during a football game arouses enthusiasm and fosters a sense of shared participation. The lyrics may be nonsensical, as defendants point out, but even nonsensical lyrics may enhance the environment of collective excitement that defendants provide as part of their goods and services. By having access to the lyrics, plaintiffs have the opportunity to participate in the communal entertainment experience. Without access to lyrics played, for example, during cheerleader dance routines and the halftime show, plaintiffs would not fully and equally experience the planned and synchronized promotional entertainment that large stadiums like FedEx Field provide.<sup>96</sup>

Although movie and television producers may not have followed the *Feldman* proceedings closely, the accessibility principles for song lyrics espoused in *Feldman* should be applicable to movies and television shows. If providing equal access for deaf customers at a football game means captioning song lyrics, then the same reasoning should apply to a movie or a show. Further, there is no indication in the *Feldman* opinions that any defendant cared about potential copyright infringement if the songs were made accessible to deaf customers.<sup>97</sup>

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<sup>93</sup> *Id.* at 383-84. The plaintiffs theorized that because the Redskins operated their stadium (a "public accommodation" under Title III of the ADA), the Redskins were required to provide auxiliary aids and services, including captioning.

<sup>94</sup> *Feldman v. Pro Football, Inc.*, 579 F. Supp.2d 697, 702-03 (D. Md. 2008), *aff'd*, 419 Fed. Appx. 381 (4th Cir. Mar. 25, 2011).

<sup>95</sup> *Id.* at 709 ("On the face of the statute, the Court believes and concludes that Title III of the ADA requires Defendants to provide deaf and hard of hearing fans equal access to the aural information broadcast over the stadium bowl public address system at FedEx Field, which includes *music with lyrics*, play information, advertisements, referee calls, safety/emergency information, and other announcements") (emphasis added).

<sup>96</sup> *Feldman*, 419 Fed. Appx. at 391-92. Not long after the Fourth Circuit's affirmance in *Feldman*, other football venues entered consent decrees with deaf plaintiffs seeking similar full "game experiences." See Charnatz, Hedges-Wright, & Ward, *Personal Foul: Lack of Captioning in Football Stadiums*, 45 VAL. U. L. REV. 967, 994-96 (2011); Haney, *supra* note 3, at 466, 482-83.

<sup>97</sup> See *Feldman*, 419 Fed. Appx. at 390-91 ("Defendants do not contend that captioning the aural information described in the district court's order would constitute a fundamental alteration or an undue burden. Our inquiry is therefore limited to whether the ADA requires defendants to provide auxiliary aids for the aural content broadcast over the stadium bowl's public address system in order to provide plaintiffs with 'full and equal enjoyment' of defendants' goods, services, facilities, and privileges"); see also *Feldman* at 579 F. Supp.2d at 709-10 ("Other than broad and conclusory statements made by their counsel, Defendants have not pointed to any specific hardship or undue burden that they would suffer by providing access to music with lyrics available at FedEx Field").

### III. LEGAL BACKGROUND TO COPYRIGHT

#### A. *General Principles*

The Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>98</sup> Indeed, the first Congress recognized this right by enacting the Copyright Act in 1790.<sup>99</sup> Broadly speaking, copyrights incentivize authors to create and to disseminate their creations.<sup>100</sup> Federal courts interpret the Copyright Act in favor of copyright holders.<sup>101</sup>

To establish a *prima facie* case of copyright infringement, a plaintiff must demonstrate “ownership of a valid copyright” and the “copying of constituent elements of the work that are original.”<sup>102</sup> “The term ‘copying’ is interpreted broadly and encompasses the infringing of any of the copyright owner’s five exclusive rights.”<sup>103</sup> These exclusive rights are 1) reproduction, 2) derivative use, 3) distribution, 4) public performance, and 5) public display.<sup>104</sup>

Although early copyright decisions did not prohibit the “translation” of original works into another language,<sup>105</sup> Congress eventually made clear that copyright holders possessed the sole right to translate their original works as “derivative” works.<sup>106</sup> Moreover, it has long been accepted that copyright provides distinct protections to both the music and lyrics of a song.<sup>107</sup> It is not necessary for the copyright holder to demonstrate damages before obtaining relief.<sup>108</sup>

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<sup>98</sup> U.S. Const., art. I, § 8, cl. 8.

<sup>99</sup> See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

<sup>100</sup> See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“reward to the author or artist serves to induce release to the public of the products of his creative genius”); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (copyright is “intended to motivate the creative activity of authors”).

<sup>101</sup> See, e.g., *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686, 692 (S.D.N.Y. 1948) (citing, *inter alia*, *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30 (1939)); see also *Shaab v. Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972) (three-judge panel) (noting that copyright protection should be interpreted broadly in favor of song copyright holders because technological advances are lifeblood of industry).

<sup>102</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>103</sup> *U-Haul Int’l, Inc. v. WhenU.com, Inc.*, 279 F. Supp.2d 723, 729 (E.D. Va. 2003).

<sup>104</sup> See *Softech Worldwide, LLC v. Internet Tech. Broad. Corp.*, 761 F. Supp.2d 367 (E.D. Va. 2011) (citing 17 U.S.C. § 106).

<sup>105</sup> See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 207-08 (C.C. E.D. Pa. 1853) (Grier, J.) (refusing to enjoin unauthorized translation of *Uncle Tom’s Cabin*); but see *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484, 487 n.3 (2d Cir. 1977) (Friendly, J.) (citing several 19th Century decisions giving copyright protection to authors from “derivative works” including “translations” under common law).

<sup>106</sup> See, e.g., *Radji v. Khakbaz*, 607 F. Supp. 1296, 1300 (D. D.C. 1985) (citing 17 U.S.C. § 106(2) and enjoining defendant from publishing plaintiff’s book in different language without authorization).

<sup>107</sup> See, e.g., *Standard Music Roll Co. v. F.A. Mills, Inc.*, 241 F. 360, 362-63 (3d Cir. 1917); see also *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996) (“Song lyrics enjoy independent copyright protection as literary works, and the right to print a song’s lyrics is exclusively that of the copyright holder under 17 U.S.C. § 106(1)”) (internal citation and quotation omitted).

<sup>108</sup> See, e.g., *On Davis v. The Gap, Inc.*, 246 F.3d 152, 158 (2d Cir. 2001) (“The existence of damages suffered is not an essential element of a claim for copyright infringement”).

However, copyright law “has never accorded the copyright owner complete control over all possible uses of his work.”<sup>109</sup> Rather, “the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>110</sup> Indeed, “copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”<sup>111</sup> As the Second Circuit recently explained, “copyright is ‘not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.’”<sup>112</sup> Thus, “courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science and industry.”<sup>113</sup>

With respect to captions, “U.S. law has no generally applicable statutory copyright limitation or exception for activities undertaken for accessibility purposes.”<sup>114</sup> The only explicit disability-related exception in the Copyright Act is the 1996 Chafee Amendment, which allows entities to convert certain copyrighted works into specialized formats such as Braille for visually-impaired citizens.<sup>115</sup> However, the Chafee Amendment is limited to visual impairments and says nothing about accessibility for persons with hearing disabilities.<sup>116</sup>

## B. *The Fair Use Defense*

At least two legal academic commentators believe that the “fair use” affirmative defense of the Copyright Act should resolve any potential conflict between captioning accessibility and copyright concerns.<sup>117</sup> “From the infancy of copyright

<sup>109</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

<sup>110</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Fogerty*, 510 U.S. at 526 (“[T]he monopoly privileges that Congress has authorized . . . must ultimately serve the public good.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“[I]t should not be forgotten that . . . the ultimate aim [of copyright law] is . . . to stimulate [the creation of useful works] for the general public good”); *Sony*, 464 U.S. at 429.

<sup>111</sup> *Paramount Pictures*, 334 U.S. at 158; *accord Feist*, 499 U.S. at 349 (observing that “[t]he primary objective of copyright is not to reward the labors of authors”).

<sup>112</sup> *HathiTrust*, 755 F.3d at 95 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990)).

<sup>113</sup> *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (quoting *Berlin v. E. C. Pubs. Inc.*, 329 F.2d 541, 544 (2d Cir. 1964)).

<sup>114</sup> Reid, *supra* note 3 at 18; *see also id.* at 17 (“Congress has never explicitly dealt with the potential conflict between captioning mandates and copyright law. . .”). In addition, the FCC declined to definitively speak as to the relationship between captioning and copyright at least twice. *See id.* at 16 n.60.

<sup>115</sup> *See* 17 U.S.C. § 121; *see also* 18 Am. Jur.2d *Copyright and Literary Property* § 98 (2012) (further discussion).

<sup>116</sup> *See* Reid, *supra* note 3 at 18 (stating the “Chafee Amendment. . . permits certain authorized entities to reproduce and distribute certain copyrighted literary works. . . in specialized formats, such as Braille, for use by people who are blind or visually impaired. However, the Chafee Amendment does not extend to video programming or closed captions. . .”).

<sup>117</sup> *See id.* at 18-23 (“Perhaps the best hope for resolving the potential tension between copyright and captioning is the fair use doctrine.”); Wooten, *supra* note 3 at 152 (explaining “[T]here is a . . . fair use

protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts."<sup>118</sup> Section 107 of the Copyright Act lists four nonexclusive factors which are to be weighed together to assess whether a particular use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>119</sup>

Fair use is an affirmative defense to a claim of copyright infringement, and the defendant bears the burden of establishing fair use.<sup>120</sup> A defendant need not prevail with respect to each of the four enumerated fair-use factors to succeed on a fair-use defense.<sup>121</sup> Rather, all four statutory factors "are to be explored, and the results weighed together, in light of the purposes of copyright."<sup>122</sup> Courts also generally recognize that the public interest in a challenged use of a copyright deserves strong consideration in a fair use analysis.<sup>123</sup>

With respect to captioning, there have been no reported decisions determining whether captioning constitutes fair use of copyrighted material.<sup>124</sup> However,

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argument for allowing . . . companies to provide closed captioning without the permission of copyright owners.")

<sup>118</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., art. I, § 8, cl. 8) (alteration in original); see also *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (listing some predecessors of current statutory fair use factors); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1451-54 (1997) (summarizing origins of fair use doctrine).

<sup>119</sup> 17 U.S.C. § 107. Courts occasionally consider the good faith (or lack thereof) of the alleged infringer. See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981); *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F.Supp.2d 324, 333 (S.D.N.Y. 2005) (good faith is a positive factor in fair use analysis); *Field v. Google Inc.*, 412 F. Supp.2d 1106, 1122 (D. Nev. 2006) (citing *Fisher v. Dees*, 794 F.2d 432, 436-37 (9th Cir. 1986)).

<sup>120</sup> See, e.g., *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994).

<sup>121</sup> See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004).

<sup>122</sup> *Campbell*, 510 U.S. at 578; accord *Sony*, 464 U.S. at 448 & n.31 (the fair use doctrine is an "equitable rule of reason"); *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 141 (2d Cir. 1998) (internal citation omitted) ("The ultimate test of fair use . . . is whether the copyright law's goal of 'promot[ing] the Progress of Science and useful Arts' would be better served by allowing the use than by preventing it.").

<sup>123</sup> See, e.g., *Am. Geophysical Union*, 60 F.3d at 922 ("[C]ourts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest"); *Sundeman v. Seejay Soc'y, Inc.*, 142 F.3d 194, 203-04 (4th Cir. 1998) (considering public benefit from the challenged use in connection with "the development of art, science and industry"); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1993) (reasoning that "we are free to consider the public benefit resulting from a particular use" and that "[p]ublic benefit need not be direct or tangible, but may arise because the challenged use serves a public interest"); but see *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 12361240; (D. Colo. 2006) (stating that public policy arguments submitted to the district court are "inconsequential to copyright law" and "addressed in the wrong forum" because the "Court is not free to determine the social value of copyrighted works").

<sup>124</sup> The only decision that came close to the issue was *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp.2d 196 (D. Mass. 2012).

one accessibility case strongly indicates that captioning falls within the defense. In the mid-2000s, a consortium of universities (including Cornell University, Indiana University, and the Universities of Michigan, California, and Wisconsin) began what was called the HathiTrust Digital Library (“HDL”). These universities partnered with Google in 2005 to scan millions of books found in these universities’ libraries and to make “snippets” of those books available online via Google’s search engine.<sup>125</sup> After Google scanned each book, it provided a digital image and a text version of the book to the library that owned the original.<sup>126</sup> In turn, the libraries contributed the files to the HDL.<sup>127</sup>

The purposes of the HDL were threefold. First, it allowed library patrons to conduct full-text searches for books within the HDL.<sup>128</sup> Second, it allowed for preservation of older books against catastrophes such as flooding or fire, or even simply against theft or misplacement.<sup>129</sup> Third—and most importantly for this article—it allowed access to the books for patrons who had “print disabilities.”<sup>130</sup>

In 2011, a group of plaintiff copyright holders consisting of several individual authors, as well as author associations, brought suit in federal court, asserting that the HDL project violated their copyrights and sought declaratory relief.<sup>131</sup> Although the case involved a number of interesting issues, only the accessibility for patrons with print disabilities is pertinent here.

The university defendants conceded that the plaintiffs had established a *prima facie* case of copyright infringement.<sup>132</sup> Nonetheless, the defendants asserted that the

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<sup>125</sup> *HathiTrust*, 902 F. Supp.2d at 448 (S.D.N.Y. 2012), *aff’d* in part, *vacated* in part 755 F.3d 87 (2d Cir. 2014).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; *see also id.* at 459.

<sup>130</sup> *Id.* at 448; *see also HathiTrust*, 755 F.3d at 91 (explaining “print disabilities” included not only blindness or severe vision impairments, but also disabilities that prevented patrons from holding a book or physically turning a book’s pages). As explained by the *HathiTrust* district court:

Prior to the development of accessible digital books, the blind could access print materials only if the materials were converted to braille or if they were read by a human reader, either live or recorded. Absent a program like the Mass Digitization Project print-disabled students accessed course materials through a university’s disability student services office, but most universities are able to provide only reading that was actually required. Print-disabled individuals read digital books independently through screen access software that allows text to be conveyed audibly or tactilely to print-disabled readers, which permits them to access text more quickly, reread passages, annotate, and navigate, just as a sighted reader does with text. Since the digital texts in the HDL became available, print-disabled students have had full access to the materials through a secure system intended solely for students with certified disabilities. Many of these works have tables of contents, which allow print-disabled students to navigate to relevant sections with a screen reader just as a sighted person would use the table of contents to flip to a relevant portion. In other words, academic participation by print-disabled students has been revolutionized by the HDL.

*HathiTrust*, 902 F. Supp.2d at 448-49 (internal citations and quotations omitted).

<sup>131</sup> *Id.* at 449.

<sup>132</sup> *Id.* at 458 & n.18.

HDL was protected by the fair use defense because, *inter alia*, the HDL was made for the purpose of providing access for patrons with print disabilities. The district court weighed the four fair use factors and found a valid fair use defense.

With respect to the first factor in this context, the district court determined that allowing patrons with print disabilities to perform academic research “tilts in the defendants’ favor” for fair use.<sup>133</sup> The district court also highlighted that allowing people with disabilities the same access as their peers was the primary goal of the ADA,<sup>134</sup> and that the Supreme Court had also endorsed the making copyrighted material accessible to blind citizens for the purpose of entertainment or research as “fair use.”<sup>135</sup>

The district court indicated that the second fair use factor (i.e., the nature of the copied work) also favored fair use because of the transformative nature of the HDL.<sup>136</sup> While the district court noted that the defendants had copied the entire works of the plaintiffs, the district court determined that complete copying was necessary to provide full access for patrons with print disabilities.<sup>137</sup>

The final factor dealt with the potential market for the copied material. Both parties agreed that patrons with print disabilities were “not considered to be a significant market or potential market to publishers and authors.”<sup>138</sup> The plaintiffs protested that every digital copy of their books “represent[ed] a lost sale.”<sup>139</sup> The district court responded that buying more copies of books would not address the lack of accessibility for patrons with print disabilities.<sup>140</sup>

Plaintiffs also argued (and I suspect this was the real reason why they brought the suit) that it was possible for some entity—perhaps the federal government—to create a clearinghouse-type organization that would both oversee the accessibility of books and provide compensation for the copyright holders.<sup>141</sup> In other words, plaintiffs were hoping that, at some point in the future, someone might be willing to compensate them for the copying activities of the defendants. The district court rejected

<sup>133</sup> *Id.* at 459 (citation omitted).

<sup>134</sup> *Id.* at 459 n.20 (“The ADA also provides strong support for the conclusion that the provision of access to print-disabled persons is a protected fair use.”); *see also id.* at 464 (“[P]erhaps most importantly, the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers in the ways imagined by the ADA protect the copies made by Defendants as fair use to the extent that Plaintiffs have established a *prima facie* case of infringement.”).

<sup>135</sup> *Id.* at 461 (quoting *Sony*, 464 U.S. at 455 n.40). The district court also determined that the HDL’s copying of the books was “transformative,” because allowing access to patrons with print disabilities was effectively a new use for the books. *Id.* However, this part of the district court’s opinion was rejected by the Second Circuit. *See HathiTrust*, 755 F.3d at 401 (“This is a misapprehension; providing expanded access to the print disabled is not ‘transformative.’”).

<sup>136</sup> *HathiTrust*, 902 F. Supp.2d at 462. Again, however, the Second Circuit did not agree that the HDL copying was transformative. *See supra* note 131.

<sup>137</sup> *See HathiTrust*, 902 F. Supp.2d at 462 (“Here, entire copies were necessary to fulfill Defendants’ purposes of . . . access for print-disabled individuals”).

<sup>138</sup> *Id.* at 461.

<sup>139</sup> *Id.* at 462 (citation omitted); *see also id.* at 463 n.28 (rejecting same argument again).

<sup>140</sup> *Id.* at 462.

<sup>141</sup> *Id.* at 463.



this argument as “conjecture,” noting that the possibility of a future entity paying for licenses sometime down the road exists in every fair use case and accepting such conjecture would completely defeat the purpose of the defense.<sup>142</sup>

The district court weighed the four factors and concluded that the HDL program constituted fair use: “I cannot imagine a definition of fair use that would not encompass the . . . uses made by Defendants’ [HDL project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.”<sup>143</sup> The district court entered judgment for the defendants.

On appeal, the Second Circuit vacated and remanded portions of the district court’s ruling that are not pertinent to this article.<sup>144</sup> However, the Second Circuit largely affirmed the district court’s holding with respect to fair use. The Second Circuit rejected the district court’s conclusion that making books accessible for patrons with print disabilities is “transformative.”<sup>145</sup> Rather, the Second Circuit analogized the HDL project to translations of copyrighted works into foreign languages, which would turn the HDL uses into “derivative” works.<sup>146</sup> Ultimately, however, the Second Circuit determined the error to be harmless. The Court noted that a “transformative use is not absolutely necessary for a finding of fair use,” and concluded “that providing access to the print-disabled is still a valid purpose under Factor One even though it is not transformative.”<sup>147</sup>

The Second Circuit echoed the district court in noting the Supreme Court’s endorsement of making books accessible for blind patrons as fair use.<sup>148</sup> The Second Circuit likewise noted that Congress had declared its support for accessibility by passing the ADA and Chafee Amendment.<sup>149</sup>

While the Second Circuit held that the second factor weighed in favor of the plaintiffs, the Court determined that the remaining factors favored fair use.<sup>150</sup> The Second Circuit agreed with the district court that copying the entire works was

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<sup>142</sup> *Id.*; see also *id.* at 464 (“Even if Congress will eventually find a way to regulate this area of the law, ‘it is not the [court’s] job to apply laws that have not yet been written’”) (quoting *Sony*, 464 U.S. at 456)). The plaintiffs also suggested that patrons with print disabilities could have individually sought permission from the individual copyright holders to make their books accessible. The district court dismissed this suggestion as “border[ing] on ridiculous.” *Id.* at 461 n.25.

<sup>143</sup> *Id.* at 464.

<sup>144</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2013).

<sup>145</sup> See *id.* at 101.

<sup>146</sup> *Id.* (“The Authors contend that by converting their works into a different, accessible format, the HDL is simply creating a derivative work. It is true that, oftentimes, the print-disabled audience has no means of obtaining access to the copyrighted works included in the HDL. But, similarly, the non-English-speaking audience cannot gain access to untranslated books written in English and an unauthorized translation is not transformative simply because it enables a new audience to read a work.”).

<sup>147</sup> *Id.* at 101-02 (quotation and citation omitted).

<sup>148</sup> *Id.* at 102 (quoting *Sony*, 464 U.S. at 455 n. 40).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 101-03.



necessary to make the works accessible for patrons with print disabilities.<sup>151</sup> The Second Circuit likewise agreed with the district court that the market for books catered to those with print disabilities was insignificant.<sup>152</sup> Thus, “[w]eighing the factors together,” the Second Circuit “conclude[d] that the doctrine of fair use allows the libraries to provide full digital access to copyrighted works to their print-disabled patrons.”<sup>153</sup>

It is true that *HathiTrust* involved making copyrighted materials accessible for blind users for academic purposes. However, there is no reason why a court’s legal analysis should be limited to the facts of the case.<sup>154</sup> Film and television studios would be well-advised to review the *HathiTrust* opinions before continuing their practices of not captioning song lyrics for deaf customers.<sup>155</sup>

#### IV. THE EMERGENCE OF COPYRIGHT CONCERNS IN CAPTIONING

If songwriters wished to object to the early captioning efforts on copyright grounds, they could have made a credible case. As previously discussed, copyright law protected both the music and the lyrics to a song.<sup>156</sup> Captioning song lyrics is certainly “copying” within the ordinary meaning of the word.<sup>157</sup> Moreover, it was not until later in the twentieth century when Congress determined that public policy favored captioning for accessibility purposes.

Yet, songwriters never objected to the practice of captioning sound lyrics on copyright grounds. It wasn’t until the mid-1990s when it was first suggested that captioning could potentially infringe upon copyrights.<sup>158</sup> Prior to that time, there does not appear to be any indication that anyone expressed copyright concerns over captioning accessibility for song lyrics. While evidence shows that some studios were concerned about copyright issues in loaning their films to captioning vendors in the 1950s and 1960s, their fears were focused primarily on potential piracy of the

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<sup>151</sup> *Id.* at 103. (“For those individuals, gaining access to the HDL’s image files—in addition to the text-only files—is necessary to perceive the books fully. Consequently, it is reasonable for the Libraries to retain both the text and image copies”).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *infra* notes 198-220 and accompanying text (applying analyses of *HathiTrust* opinions to captioning song lyrics).

<sup>155</sup> The Motion Picture Association of America filed an amicus brief on the plaintiffs’ side in the Second Circuit *HathiTrust* proceedings. See Brief for Motion Picture Association of America, Inc. *Amicus Curiae* Supporting Plaintiffs-Appellants, *Authors Guild, Inc., v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2013) (No. 12-4547), available at <http://www.scribd.com/doc/128740415/Amicus-Brief-Motion-Picture-Assoc-of-America>.

<sup>156</sup> See *supra* note 107 and accompanying text.

<sup>157</sup> Cf. Reid, *supra* note 3, at 9 (acknowledging that captioning potentially implicates copyright).

<sup>158</sup> See *Closed Captioning and Video Description and Video Description of Video Programming*, Report and Order, MM Docket No. 95-176, 13 FCC Rcd. 3272, 3285-86, ¶ 25 (1997) (“[S]everal [video] distributors argue that copyright law may prevent them from closed captioning the programming they distribute”), available at <http://transition.fcc.gov/Bureaus/Cable/Orders/1997/fcc97279.txt>.

film itself, rather than any accessibility issues.<sup>159</sup> As explained by Dr. Boatner in describing early captioning efforts:

Film producers were plagued by widespread film piracy, although they did everything they could to guard against it. For this reason, they were unwilling to sell or lease prints of any of their better films.

This made it very difficult to obtain films of suitable quality, even though we were willing to sign agreements, as we were able to in some cases that the films would only be shown in schools for the deaf. As time went on, the situation improved somewhat, but acquisition remained a very difficult problem. Since RKO was the most cooperative studio, most of our films were obtained from them.<sup>160</sup>

Eventually, piracy concerns dissipated, and many studios allowed captioning of their films.<sup>161</sup>

Moreover, as previously discussed, there have been numerous lawsuits from deaf plaintiffs seeking captioning access from entertainment entities.<sup>162</sup> There is no indication whatsoever in any of these decisions that captioning anything—let alone song lyrics—would infringe upon copyrights.<sup>163</sup>

So, what happened? It is possible that copyright holders in the late 1990s attempted to collect extra money from studios in exchange for the “right” to caption song lyrics. In fact, around that time, the American Society of Composers, Authors and Publishers (ASCAP), a group that represents copyright holders, reportedly demanded royalties from the Girl Scouts for the right to sing “Happy Birthday” at campfires.<sup>164</sup> If such was the case here, then the copyright holders should truly be ashamed of themselves. Indeed, the Chief Judge of the Ninth Circuit called the movie theaters “jerks” at the *Harkins* oral argument for refusing to install captioning equipment for deaf viewers.<sup>165</sup>

<sup>159</sup> See generally KERRY SEGRAVE, *PIRACY IN THE MOTION PICTURE INDUSTRY* (McFarland & Co. 2003) (extensive discussion of history of movie piracy with no mention of captions or disability accessibility).

<sup>160</sup> Boatner, *supra* note 43 at 6; accord Kovalik, *supra* note 43 at 103 (“producers were initially reluctant to lease their better films, fearing that the freely distributed captioned versions would cut into profits at the movie theaters”).

<sup>161</sup> Kovalik, *supra* note 43 at 103.

<sup>162</sup> See *supra* notes 62-63, 78-83, 86-91 and accompanying text. See also *Stoutenborough v. National Football League*, 59 F.3d 580 (6th Cir. 1995) (unsuccessful suit contending that NFL’s “blackout rule” left games inaccessible for deaf hometown football fans); *Greater L.A. Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353 (9th Cir. 1987) (directing Department of Commerce to consider conditioning funding to stations on their compliance with captioning accessibility).

<sup>163</sup> See, e.g., *supra* note 97 and accompanying text (*Feldman* defendants did not raise any copyright issues).

<sup>164</sup> See Elisabeth Bumiller, *ASCAP Asks Royalties From Girl Scouts, and Regrets It*, *NEW YORK TIMES* (Dec. 17, 1996), <http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html>. I am grateful for Professor Reid for reminding me of the Girl Scouts fiasco.

<sup>165</sup> See Oral Argument at 48:15 – 48:40, *Harkins v. Arizona*, 603 F.3d 666 (9th Cir. 2010) (No. 08-16075) (“You are going to lose eventually. . . . [Y]ou are going to lose this battle in the end. You can get out in front of it and be the good guys [and voluntarily provide captioning access to deaf patrons], or you can be dragged kicking and screaming and look like jerks. I don’t understand why you are choosing to fight this battle”) (remarks of Chief Judge Alex Kozinski), available at <http://www.ca9.uscourts.gov/>

However, I believe that situation is unlikely. I find it unfathomable that Paul McCartney—or whoever owns the right to the song “Live and Let Die”—1) allowed the song to be captioned when the movie *Live and Let Die* was broadcast on television and released on VHS, 2) objected to the song being captioned when *Live and Let Die* was released on DVD, and 3) had a change of heart to allow the song to be captioned when *American Hustle* was released in theaters and on DVD.<sup>166</sup> Given that movies had been captioned since the 1940s, and television shows had been captioned since the 1970s—with no discernible complaint that captioning song lyrics infringed on copyright issues—and given that captioning song lyrics became very hit-or-miss in the DVD era, I believe that something else happened.

It is my theory that the decision to stop captioning song lyrics came as the result of two court decisions from the 1990s. The first was *Bourne Company v. Walt Disney Company*.<sup>167</sup> In the mid-1980s, the Walt Disney Company decided to release several of its classic animated features on VHS tapes for purchase to the general public.<sup>168</sup> The decision proved highly lucrative.<sup>169</sup> Many, if not all, of these VHS tapes were captioned for deaf viewers—including the song lyrics.<sup>170</sup>

Seeking to build upon the initial success of VHS sales of *Pinocchio* (among others), Disney re-released some VHS tapes in so-called “sing along” format a few years later.<sup>171</sup> As described by one court “[e]ach sing-along videocassette shows video clips synchronized with songs while the lyrics to the songs appear at the bottom of the screen with a ‘bouncing ball,’ sometimes in the shape of Mickey Mouse’s head, so that viewers can sing to the music.”<sup>172</sup>

In 1939, Disney procured a license from the copyright holder to use several songs in *Pinocchio* when the film was released.<sup>173</sup> This copyright holder later argued that Disney’s utilization of the lyrics in the “sing-along” VHS tapes infringed upon the copyrights to the songs and thus required a new license.

A federal court agreed.<sup>174</sup> The court rejected Disney’s defense that the 1939 license granted Disney the rights to use the songs featured in *Pinocchio* as Disney pleased.<sup>175</sup> Rather, the court determined that utilizing lyrics in “sing-along” format

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media/view\_subpage.php?pk\_id=0000004752.

<sup>166</sup> Compare LIVE AND LET DIE Television Broadcast (ABC March 29, 1981) with LIVE AND LET DIE DVD (MGM/UA released Oct. 19, 1999) and AMERICAN HUSTLE DVD (Atlas Entertainment released March 18, 2014).

<sup>167</sup> *Bourne Co. v. Walt Disney Co.*, No. 91 Civ. 0344, 1992 WL 204343 (S.D.N.Y. Aug 7, 1992).

<sup>168</sup> See JAMES B. STEWART, *DISNEYWAR* at 91-96 (2005).

<sup>169</sup> See *id.* at 93 (“Home video sales rapidly became Disney’s biggest profit center apart from the theme parks”).

<sup>170</sup> See *Pinocchio 1985 Cover*, DEVIANTART, <http://nickwilliam89.deviantart.com/art/Pinocchio-1985-Cover-151144726> (last visited Feb. 27, 2015) (captioning symbol—a quotation mark with a hollow square—is plainly visible at the bottom of the jacket binding of VHS copy of *Pinocchio*).

<sup>171</sup> See *Bourne*, 1992 WL 204343, at \*2.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at \*2-3.

<sup>174</sup> See *id.* at \*7.

<sup>175</sup> *Id.* at \*5 (“even if . . . Disney had acquired the right to use the *Pinocchio* songs on videocassettes,

was “qualitatively different from Disney’s prior uses of that song, which did not include the printed or additional lyrics. The right to print the lyrics . . . is qualitatively different from the right to synchronize that song with a visual image.”<sup>176</sup> The court then enjoined Disney from further unauthorized use of the copyrighted songs in “sing-along” format in VHS tapes.<sup>177</sup>

The second case was *ABKCO Music, Incorporated. v. Stellar Records, Incorporated*.<sup>178</sup> In *ABKCO*, song copyright holders contended that unauthorized use of song lyrics in the defendant’s karaoke machines violated the Copyright Act.<sup>179</sup> Karaoke machines were very similar to the “sing-along” VHS tapes in *Bourne*.<sup>180</sup> Perhaps unsurprisingly, the litigation in *ABKCO* largely mirrored the disputes in *Bourne*, in so much as the defendants claimed that a previous licensing agreement permitted the utilization of the song lyrics in the karaoke machines, whereas the copyright holders asserted that additional authorization was required.<sup>181</sup> The result was the same as well. Indeed, the Second Circuit cited *Bourne* in holding in favor of the copyright holders.<sup>182</sup>

Coincidence or not, soon after *Bourne* and *ABKCO*, the first suggestions were made that captioning song lyrics for deaf viewers potentially violated copyright law.<sup>183</sup> This was roughly the same time when studios were converting to DVD technology from VHS.<sup>184</sup> Based upon this timing, it is likely that some entertainment industry lawyers misinterpreted *Bourne* and *ABKCO* as meaning that *any* form of printing song lyrics is a copyright violation—including captioning for deaf viewers. These lawyers may have advised their studio-clients to stop captioning song lyrics on DVDs.

Notably, such “captioning infringes copyrights” suggestions were not made by holders of copyrights to songs. Rather, as Professor Reid has astutely noted, such concerns were raised “by targets of accessibility laws and regulations that would require them to caption their programming.”<sup>185</sup> In other words, the studios—not

that would not give it the right to print the lyrics of those songs, a right which appears to rest exclusively with *Bourne*”). Disney did not help its case by stating—incorrectly—in the VHS tapes that it owned the copyrights to the songs. *See id.* at \*3.

<sup>176</sup> *Id.* at \*4; *see also supra* note 107 and accompanying text (music and lyrics have separate copyrights).

<sup>177</sup> *See Bourne*, 1992 WL 204343, at \*7.

<sup>178</sup> *ABKCO Music*, 96 F.3d 60 (2d Cir. 1996).

<sup>179</sup> *Id.* at 62.

<sup>180</sup> *See id.* (“[F]or a user who has a CD player with a video output, the lyrics of the songs can be displayed on a video screen in ‘real time’ as the songs are playing so that the viewer can sing the lyrics along with the recorded artist”).

<sup>181</sup> *See id.*

<sup>182</sup> *See id.* (citing and quoting *Bourne*, 1992 WL 204343, at \*\*4-5).

<sup>183</sup> *See supra* notes 18-31, 154 and accompanying text.

<sup>184</sup> *See, e.g., Universal City Studios*, 111 F.Supp.2d at 309 (noting transition from VHS to DVD in 1990s).

<sup>185</sup> Reid, *supra* note 3, at 12; *see also id.* at 12-13 & n.47 (“When laws and regulations target third parties, the third parties often argue that they cannot do so because captioning programs in which they don’t hold a copyright would force them to violate copyright law.” (citing several examples)); Reply

the songwriters—claimed that captioning would violate copyright law.<sup>186</sup> It is easy to suspect that such concerns amounted to nothing more than crocodile tears. After all, captioning costs money.<sup>187</sup> Though the cost of captioning song lyrics may be small, if not miniscule, it is still a cost.<sup>188</sup> Even assuming studios were acting in good faith—and were not simply trying to save money by refusing to caption song lyrics—they seem to be defending against an imaginary threat.<sup>189</sup> Studios apparently believe that if they caption song lyrics, they risk the wrath of the copyright holders.<sup>190</sup>

However, if there is any evidence that copyright holders ever believed at any time that captioning song lyrics in a movie when the producer otherwise has valid rights to use the song amounted to infringement, I am not aware of it. It is apparent by the sheer lack of literature and claims on the topic that copyright holders are not opposed to allowing producers to caption song lyrics for deaf patrons.<sup>191</sup> Even more telling, there is no indication that the copyright holder in *Bourne* cared that the songs

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Comments of Public Knowledge, *In the Matter of Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, FCC MB Docket No. 11-154, at 4 (Nov. 1, 2011) (“Tellingly, only video programming intermediaries have contended that captioning would constitute an infringement in this proceeding; no studios or other content creators have joined in their refrain”), available at <<https://www.publicknowledge.org/files/PKCaptioningReply.pdf>>. Studios are on thin legal ice by asserting copyrights of third parties. See *infra* notes 223-24 and accompanying text.

<sup>186</sup> This is hardly the first time targets of accessibility laws attempted to avoid captioning responsibilities on the grounds that captioning mandates would potentially violate rights of another party. In the television context, broadcast stations argued that captioning mandates would potentially infringe upon the First Amendment rights of producers of shows. Heldman, *supra* note 3 at 114 & n.287 (citing Joint Brief of Broadcaster Interveners, *Gottfried v. FCC*, No. 79-1722, (D.C. Cir.) at 29-30). The D.C. Circuit rejected the argument. See *Gottfried v. FCC*, 655 F.2d 297, 312 n.54 (D.C. Cir. 1981). Similarly, movie theaters argued that they lacked the rights to caption feature presentations when they faced ADA lawsuits for failing to install captioning equipment—even though the plaintiffs had affidavits from several studios and producers attesting they had no problem with captioning their films. See, e.g. *Ball*, 246 F. Supp.2d at 25 & n.18 (rejecting defendant’s argument). And the *National Association of the Deaf* court was equally unimpressed by the defendant’s contention that it lacked control over programming content and therefore could not be expected to provide captions. See *Nat’l Ass’n of the Deaf*, 869 F. Supp.2d at 202 (defendant’s ostensible “lack of control” over programming content defense “lacks traction” under the ADA).

<sup>187</sup> Cf. *Nat’l Ass’n of the Deaf*, 869 F. Supp.2d at 205 (defendant raised “economic burden” defense in captioning lawsuit; court deferred resolution of issue for further discovery).

<sup>188</sup> Cf. Heldman, *supra* note 3 at 121 (“Left to their own devices, then, the networks will continue to maximize profits, depriving the hearing impaired of many potential benefits of [captioning]”). From what I understand from captioning providers, captioning a three-minute song in a movie or show costs roughly \$60.

<sup>189</sup> See, e.g., Reply Comments of Public Knowledge, *supra* note 185 at 3-4 (“Captioning works to make them accessible for persons with disabilities fits nicely within the fair use doctrine, and it is difficult to imagine that a content creator would actually threaten a lawsuit because someone else made their work accessible to a customer who happened to be deaf.”). But see *supra* note 155.

<sup>190</sup> See *supra* note 186 and accompanying text.

<sup>191</sup> Indeed, music licensing treatises do not mention the issue. See, e.g. KEVIN PARKS, MUSIC AND COPYRIGHT IN AMERICA—TOWARD THE CELESTIAL JUKEBOX (2012); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING (4th ed. 2010); RONALD ROSEN, MUSIC AND COPYRIGHT (rev. ed. 2008); PETER MULLER, THE MUSIC BUSINESS--A LEGAL PERSPECTIVE: MUSIC AND LIVE PERFORMANCES (1994).

in the *Pinocchio* VHS tapes had been captioned for deaf viewers years before Disney released the “sing-along” VHS tapes.<sup>192</sup>

## V. THE FAIR USE DEFENSE PROTECTS CAPTIONING

To the extent a medium is covered by federal accessibility law, song lyrics in that medium must be made accessible for deaf consumers.<sup>193</sup> In theory, copyright holders may protest that the accessibility laws are in direct conflict with the Copyright Act.<sup>194</sup> Captioning providers may make an analogous argument that they have no power to caption songs because they lack the copyrights to do so.<sup>195</sup>

But does conflict actually exist between the Copyright Act and the accessibility laws? It is axiomatic that when two statutes appear to conflict but can be interpreted as consistent to accomplish both of their statutory objectives, courts will adopt the latter approach.<sup>196</sup> Courts have applied these principles to harmonize statutes and regulations with accessibility laws.<sup>197</sup> Applying the four factors of the “fair use” defense to copyright infringement would lead to harmonization between the Copyright Act and accessibility mandates in the context of captioning song lyrics.

The first fair use factor is the purpose of the copying.<sup>198</sup> Generally speaking, if copying is considered “transformative,” then it supports a finding of fair use.<sup>199</sup> A case can be made that captioning is a “transformative” use, because it makes the songs accessible for deaf viewers.<sup>200</sup> However, the Second Circuit rejected a similar

<sup>192</sup> See *supra* notes 166-77 and accompanying text.

<sup>193</sup> See *supra* notes 92-96 and accompanying text.

<sup>194</sup> See Reid, *supra* note 3, at 8-9 (noting potential conflict). Again, there is no indication that such protests have been happening in the real world. See *supra* notes 185-86 and accompanying text.

<sup>195</sup> See, e.g., *Nat'l Ass'n of the Deaf*, 869 F. Supp.2d at 202-03 (deferring resolution of this exact argument for additional discovery).

<sup>196</sup> See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *Kort v. Diversified Collection Services Inc.*, 270 F. Supp. 2d 1017, 1023 (N.D. Ill. 2003), *aff'd in part*, 349 F.3d 529 (8th Cir. 2005) (“When two federal statutes appear to conflict, absent a clearly expressed Congressional intention to the contrary, it is the duty of the courts to harmonize them where possible”); see also Brief for National Federation of the Blind et al. as Amicus Curiae Supporting Respondents-Intervenor Defendants, *Authors Guild, Inc. v. Hathitrust*, 755 F.3d 87 (2014) (No. 12-4547-cv) citing 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (7th ed.) (“Courts try to construe apparently conflicting statutes on the same subject harmoniously, and, if possible, give effect to every provision in both.”); *id.* at § 59:8 (“Generally, when interpreting two statutory sections, courts attempt to harmonize them to give effect to their purposes and, if possible, reconcile them so as to uphold the validity of both.”).

<sup>197</sup> See, e.g., *Washington v. Ind. High Sch. Athl. Assoc.*, 181 F.3d 840 (7th Cir. 1999) (holding that high school athletic age-eligibility rule could be waived if a particular athlete caused no competitive disadvantage or safety threat); *Crowder v. Kitigawa*, 81 F.3d 1480 (9th Cir. 1996) (quarantine requirement needed to be modified to accommodate individuals with visual impairments).

<sup>198</sup> See *supra* note 119 and accompanying text.

<sup>199</sup> *HathiTrust*, 755 F.3d at 101; see also *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 161 (3d Cir. 2013) (discussing examples of transformative uses).

<sup>200</sup> See Reid, *supra* note 3 at 19-20 (arguing that captioning is a transformative use); Wooten, *supra* note 3 at 154 (same).



argument in *HathiTrust*.<sup>201</sup> Moreover, it is accepted that translating works from one language to another (which captioning arguably is) is considered a “derivative” use, and thus subject to the copyright holder’s control.<sup>202</sup>

That being said, a “transformative use is not absolutely necessary for a finding of fair use.”<sup>203</sup> The Second Circuit nonetheless endorsed the use of the copying for disability accessibility purposes as proper, given the federal goals of making materials accessible to patrons with disabilities.<sup>204</sup> As there is no shortage of public policy pronouncements favoring captioning accessibility, a court should conclude that captioning song lyrics is fair use under the first factor.<sup>205</sup> As the *Feldman* courts held, federal accessibility law mandates that deaf consumers have access to song lyrics.<sup>206</sup>

Furthermore, while it is true that movies and television shows are shown for commercial reasons, it is quite a stretch to say that captioning song lyrics is profitable for studios or songwriters.<sup>207</sup> Historically, putative captioning defendants strongly

<sup>201</sup> See *supra* notes 140-41 and accompanying text. It should also be remembered that the Copyright Act is generally interpreted in favor of the copyright holders. See *supra* note 101 and accompanying text. Thus, doubts will be resolved in favor of the copyright holder. See Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1619 n.12 (1982); cf. *Apple Computer v. Franklin Computer Corp.*, 714 F.2d 1240, 1246-54 (3d Cir. 1983) (reversing district court that resolved doubts in favor of copyright infringement defendant).

<sup>202</sup> Cf. *HathiTrust*, 755 F.3d at 95 (“Paradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or a play, or the recasting of a novel as an e-book or an audiobook”).

<sup>203</sup> *Id.* at 101-02 (quoting *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (quoting *Campbell*, 510 U.S. at 579)).

<sup>204</sup> See *supra* notes 148-49 and accompanying text; see also, e.g., *Stoney v. Maple Shade Tp.*, 44 A.3d 601, 608 (N.J. App. 2012) (“given the ADA’s stated goal to eliminate discrimination against individuals with disabilities, the ‘public interest strongly favors mandating accessibility’”) (internal citation omitted, quoting *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998)).

<sup>205</sup> See, e.g., *Reid*, *supra* note 3 at 17 (“the existence of third-party captioning requirements under accessibility laws such as the 1996 Act, CVAA, ADA, Rehabilitation Act, and IDEA suggests that copyright should not serve as an absolute bar to third-party captioning”); Fothergill, *supra* note 3 at 915 (“National policy dictates that the needs of the hearing impaired are within the public interest”).

As the Second Circuit noted in *HathiTrust*, we know that public policy favors accessibility because “the Supreme Court has already said so.” *HathiTrust*, 755 F.3d at 102. Both the Supreme Court and the D.C. Circuit in *Gottfried* acknowledged that national public policy favors captioning accessibility for deaf viewers. See *Community Television of Southern California v. Gottfried*, 459 U.S. at 508; *Gottfried v. F.C.C.*, 655 F.2d at 315.

<sup>206</sup> See *supra* notes 92-96 and accompanying text.

Captioning defendants may be tempted to argue that by passing the Chafee Amendment to override copyright protections for the benefit of people with vision impairments, Congress may have not have wished to do likewise for people with hearing loss. Cf. 73 Am. Jur. 2d *Statutes* § 120 (explaining maxim of *expressio unius est exclusio alterius*). Even notwithstanding that Congress has favored captioning accessibility in numerous contexts, the district court in *HathiTrust* explicitly held that the Chafee Amendment did not preclude or preempt the fair use defense. See *HathiTrust*, 902 F. Supp.2d at 465 n.33; accord *HathiTrust*, 755 F.3d at 103 n.7 (Chafee Amendment analysis unnecessary when defendant otherwise demonstrated fair use).

<sup>207</sup> *Wooten*, *supra* note 3 at 154 (“the purpose of the captioning would be only to make these works accessible for a certain group and not for [programmers] to increase profits by transforming an original work”).



opposed captioning mandates for the entire movie and/or show primarily because it did not make economic sense for them to do so.<sup>208</sup> How could captioning song lyrics be any more profitable?

The second factor, the nature of the copyrighted work, will weigh against fair use. Songs are undoubtedly expressive and creative, and are accordingly entitled to strong copyright protection.<sup>209</sup> However, courts agree that the second factor is “is rarely found to be determinative.”<sup>210</sup>

At first blush, the third factor (the nature and amount of copying) would appear to favor the copyright holder, as the entirety of the song lyrics would be “copied” in the captioning process. However, “[t]he extent of permissible copying varies with the purpose and character of the use. . . . Sometimes it is necessary to copy entire works.”<sup>211</sup> For deaf viewers to have access to a song, the lyrics must be captioned. Again, given the laudatory purpose of providing access to deaf viewers, it seems that the third factor would weigh in favor of fair use even though song lyrics are being copied in their entirety.<sup>212</sup>

Finally, in assessing the fourth factor, a court will likely find that there is no potential market that is being displaced by captioning song lyrics for deaf viewers. This is the critical distinction between captioning and the “sing-along”/karaoke cases. Unlike the discernable market for “sing-along” videos and karaoke machines, the entertainment industry has long maintained that the deaf community is too small a market to justify captioning voluntarily.<sup>213</sup> Congress never had to mandate “sing-along” videos or karaoke machines. The free market did so instead.

Even as deaf advocates overcame the industry opposition and obtained widespread captioning, there is no indication that songwriters ever objected to their song lyrics being captioned in movies and shows for deaf viewers. “In the cases where [courts] have found the fourth factor to favor a defendant, the defendant’s work filled a market niche that the plaintiff simply had no interest in occupying.”<sup>214</sup> Indeed,

<sup>208</sup> See *supra* notes 58, 70 and accompanying text.

<sup>209</sup> See, e.g., *Campbell*, 510 U.S. at 573, 586 (song was “creative expression” that fell “within the core of the copyright’s protective purposes”).

<sup>210</sup> *HathiTrust*, 755 F.3d at 102 (quoting *Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001)).

<sup>211</sup> *Id.* (quotations and citations omitted).

<sup>212</sup> See *id.* (“Here, entire copies were necessary to fulfill Defendants’ purposes of facilitation of searches and access for print-disabled individuals”); see also Wooten, *supra* note 3 at 155 (“Because the alteration would be minimal and only add meaning for the deaf and hearing-impaired, this factor should move a court towards allowing closed captioning for most of the movies or television shows streamed by online providers”).

<sup>213</sup> See *supra* notes 56 and 70.

<sup>214</sup> *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (citing numerous cases).

For similar reasons, studios could argue that they are captioning song lyrics in “good faith.” See *supra* note 119 (cases holding that “good faith” is a factor in the fair use analysis). Given the complete lack of any discernable objection from songwriters regarding captioning of song lyrics (see *supra* notes 185-86), studios can legitimately say that they have no reason to believe that captioning song lyrics would infringe upon songwriters’ copyrights.

songwriters would be laughed out of court if they tried to argue that captioning song lyrics for deaf viewers represented a “lost sale” of their songs.<sup>215</sup> “Lost licensing revenue is relevant under the fourth factor only when the use serves as a substitute for the original.”<sup>216</sup> It seems safe to assume that deaf consumers are unlikely to purchase or download songs if the song is not captioned in a movie or show.<sup>217</sup> Nor does a “lost sale” theory consider that the same lack of accessibility problem will be present if a deaf consumer (for whatever reason) does decide to purchase the movie’s CD soundtrack.<sup>218</sup>

Furthermore, “[w]hile the mere absence of measurable pecuniary damages does not require a finding of fair use, the less adverse the effect that the alleged infringing has on a copyright owner’s expectations of financial gain, the less public benefit need be shown to justify the use.”<sup>219</sup> As discussed, there is great public benefit for captioning song lyrics.<sup>220</sup>

## VI. POTENTIAL IMPACT OF STATE LAWS

Federal laws are not extensive enough to correct every instance of disability inaccessibility. For example, as noted previously, a split of authority currently exists about whether the ADA reaches the Internet.<sup>221</sup> That being said, state laws could potentially impact the inquiry of captioning song lyrics.

### A. *Contractual Rights*

In the *NAD* lawsuit, Netflix argued that while it obtained the rights to stream movies and shows, it could not be liable for failing to caption because it did not own the copyrights to caption the same movies and shows. The district court denied Netflix’s motion for judgment on the pleadings on the issues of whether Netflix’s licensing agreements allowed for captioning, or if the copyright holders otherwise objected

<sup>215</sup> Cf. *HathiTrust* 755 F. 3d at 99 (“lost sale” theory). And this even assumes that a market for the song even exists. When Friar Tuck makes his first appearance in the film *Robin Hood: Prince of Thieves*, he drunkenly sings “Old King Richard’s gone to war, loves his wine and warring. But those of us who stay at home, there’s only beer and whoring. Play the music, dance the day, think not of tomorrow...” *ROBIN HOOD: PRINCE OF THIEVES* (Warner Bros. 1991). Yet the song is not captioned on the DVD. Even assuming that this was an original composition, and not an ancient ballad taken from the public domain, are people really going to pay money for a CD of that song?

<sup>216</sup> *HathiTrust* 755 F. 3d at 100.

<sup>217</sup> Cf. *id.* at 99 (“Authors admitted that they were unable to identify any specific, quantifiable past harm, or any documents relating to any such past harm, resulting from any of the Libraries’ uses of their works (including full-text search)”) (internal quotation omitted).

<sup>218</sup> See *Hathitrust*, 902 F. Supp.2d at 462.

<sup>219</sup> *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1049 (S.D.N.Y. 1994) (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)).

<sup>220</sup> See *supra* notes 7, 96, 205 and accompanying text. See also *HathiTrust*, 902 F. Supp.2d at 462 (citing ADA’s policy of protecting minorities in fourth factor analysis).

<sup>221</sup> See *supra* note 83.

to the captioning of their works and ordered further discovery on the issue.<sup>222</sup> The case settled before the district court could resolve the merits of Netflix's contractual defenses that it lacked the proper copyright licenses.

If studios were to re-assert Netflix's position and assert similar "lack of copyright license" contractual defenses, they would face several obstacles. First, only copyright holders are permitted to assert infringement under the Copyright Act.<sup>223</sup> At most, studios would be able to assert that captioning song lyrics violates their licensing agreements with the copyright holders. A court could order the studios to implead the copyright holders to determine whether captioning song lyrics falls within the fair use defense—or to determine whether the copyright holders even object to captioning the lyrics.<sup>224</sup>

Second, even if the lawsuit was strictly between consumers and the studios, copyright licensing agreements to be contracts and subject to ordinary contractual rules of interpretation.<sup>225</sup> Any ambiguities or questions of contract interpretation should be resolved against the party that prepared the copyright licensing agreement.<sup>226</sup> It has long been the law that "licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards."<sup>227</sup> Presumably, any presentation of the copyrighted material that falls within the fair use doctrine would be considered acceptable leeway under a license. Furthermore, when a statutory obligation and a contractual obligation conflict, the statutory obligation generally controls.<sup>228</sup> The ADA's legislative history and regulations likewise make clear that public accommodations cannot evade accessibility obligations through contract.<sup>229</sup> The FCC has stated that assuming any captioning rights for distribution of video programming are

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<sup>222</sup> See *Nat'l Ass'n of the Deaf*, 869 F. Supp.2d at 202-03.

<sup>223</sup> See, e.g., *ABKO Music Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991) ("[T]he Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf"); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 n.3 (2d Cir. 1982) ("[T]he Copyright Law is quite specific in stating that only the 'owner of an exclusive right under a copyright' may bring suit."); see also *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) ("[U]nder traditional principles of statutory interpretation, Congress' explicit listing of who may sue for copyright infringement should be understood as an exclusion of others from suing for infringement").

<sup>224</sup> Cf. *Indep. Living Resources v. Or. Arena Corp.*, 982 F. Supp. 698, 768 (D. Or. 1997) (suggesting that defendant tenant could implead landlord in ADA suit when tenant contended that landlord was responsible for disability accessibility).

<sup>225</sup> See, e.g., *Cincom Sys., Inc. v. Novelis Corp.*, 581 F.3d 431, 437 (6th Cir. 2009); *Kennedy v. Nat'l Juvenile Det. Ass'n*, 187 F.3d 690, 694 (7th Cir. 1999).

<sup>226</sup> *In re Amica, Inc.*, 135 B.R. 534, 548 (Bankr. N.D. Ill. 1992).

<sup>227</sup> *Gilliam v. Am. Broadcasting Cos., Inc.*, 538 F.2d 14, 23 (2d Cir. 1976).

<sup>228</sup> See, e.g. *Producers Transp. Co. v. R. Comm'n*, 251 U.S. 228, 232 (1920); see also 17A Am. Jur.2d *Contracts* §§ 229, 237.

<sup>229</sup> See 28 C.F.R. §§ 36.202(a)-(d), 36.204; see also H.R. Rep. No. 101-485(II) at 104, reprinted at 1990 U.S.C.C.A.N. 387 ("[T]he reference to contractual arrangements is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act. . . . Likewise, of course, a covered entity may not use a contractual provision to reduce any of its obligations under this Act.").

in question, they must be resolved in contractual negotiations between the programmer and copyright holders.<sup>230</sup>

Thus, to the extent that captioning obligations are governed by federal law, it is highly dubious whether ostensible contractual defenses will be of any avail to the studios or distributors that wish to use it as a defense.<sup>231</sup> As previously noted, in 2014 Netflix was still refusing to caption the lyrics to the opening theme song to *Orange is the New Black*.<sup>232</sup> Why is Netflix making music licensing deals that do not account for captioning obligations? Was Netflix simply not aware of the FCC's captioning mandates? If not, did Netflix enter into contracts that explicitly barred it from asserting fair use rights and captioning the song? If Chief Judge Kozinski thought that movie theaters were "jerks" for not installing captioning equipment, surely he would be even more displeased with companies that enter into contracts expressly saying that they will not caption songs.<sup>233</sup> The statutory obligations trump contractual rights.<sup>234</sup>

## B. *State Disability Access Laws*

Anecdotally speaking, the failure to caption song lyrics occurs most often in DVDs.<sup>235</sup> Generally, DVDs are not governed by federal accessibility laws.<sup>236</sup> Yet some state or local laws provide broader rights to people with disabilities than federal law does.<sup>237</sup> The ADA is explicitly non pre-emptive, giving way to state or local laws that provide "greater or equal protection for the rights of individuals with disabilities than are afforded by this Act."<sup>238</sup> The 1996 Act likewise, expressly provides that it

<sup>230</sup> See 47 C.F.R. § 79.4(c)(1)(ii), (2)(ii) (requiring video programming distributors and copyright holders to agree upon and implement a "mechanism" to identify video programming that must be captioned pursuant to the FCC's rules).

<sup>231</sup> Presumably, the same result will occur with respect to state law. See, e.g., *Barczak v. Rockwell Intern. Corp.*, 244 N.W.2d 24, 26-27 (Mich. App. 1974) ("both this state and the Federal government have strong public policies in favor of remedying any violation of an individual's civil rights").

<sup>232</sup> See *supra* note 4.

<sup>233</sup> See *supra* text accompanying note 165.

<sup>234</sup> See *supra* note 228-31 and accompanying text; cf. *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a private employer may not escape responsibility for its own violations of Title VII by relying upon its contract with any other party").

<sup>235</sup> As noted earlier, there are occasional problems when the shows are aired on television as well. See *supra* notes 30-31 and accompanying text.

<sup>236</sup> See, e.g., *Jancik*, 2014 WL 1920751 at \*4; see also *supra* text accompanying note 83.

<sup>237</sup> See, e.g., *Nidzon v. Konica Minolta Business Solutions, USA, Inc.*, 2010 752 F. Supp.2d 336 (S.D.N.Y. 2010) (New York City Human Rights Law is construed more broadly than federal civil rights laws); Minehan, *New California Law Significantly Expands ADA Protections*, HR WIRE (Jan. 15, 2001); *Safety Reasons Scrutinized Under State, Federal Laws* 15 No. 12 ADA Compliance Guide Newsl. 4 (Dec. 2004) (discussing Wisconsin disability law; also noting that California, Illinois, Maryland, Minnesota, New Jersey, New York and Rhode Island have broader disability laws than federal ADA).

<sup>238</sup> 42 U.S.C. § 12201(b) (2009); see also *Jankey v. Song Koo Lee*, 290 P.3d 187, 194 (Cal. 2012) ("Congress can determine that, so long as a state law affords equal or greater protection than the ADA, it categorically should be treated as not preempted.") (citing *Wood v. County of Alameda*, 875 F. Supp. 659, 663-664 (N.D. Cal. 1995)).

“shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided.”<sup>239</sup>

To discuss how state disability accessibility laws may offer broader protection than federal laws is beyond the scope of this paper. However, I will briefly discuss California’s laws because some precedent already exists.

In 2014, the Ninth Circuit certified to the California Supreme Court the question of whether the California Disabled Persons Act (“CDPA”) applies to non-physical places such as websites.<sup>240</sup> A broad interpretation of the CPDA could potentially reach DVD producers, whereas a narrow reading would not. The certification order was withdrawn, however, when the parties reached a settlement.<sup>241</sup>

California also has the Unruh Act, which states that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”<sup>242</sup> While the text may seem to apply to DVD producers, the California courts have ruled that the defendant must have engaged in “intentional discrimination” by engaging in acts of “willful, affirmative misconduct.”<sup>243</sup> One federal court applying the Unruh Act held that an unfulfilled promise to offer captioning content did not amount to affirmative misconduct.<sup>244</sup> It remains to be seen whether DVD producers’ intentional decisions not to caption song lyrics—even if based on an erroneous interpretation of copyright laws—would meet the “intentional discrimination” standard of the Unruh Act.

### C. *Consumer Class Action Remedies*

Deaf viewers could potentially utilize a litany of state consumer law remedies against DVD producers for failing to caption song lyrics. Again, a meaningful discussion of all potential state consumer remedies is beyond the scope of this paper. However, some precedent from California exists and merits brief discussion here.

Although the case quickly settled, the premise of the *Boltz* suit may provide a template for plaintiffs hoping to utilize consumer remedies in captioning cases.<sup>245</sup> In *Boltz*, the plaintiff charged that a “captioning” designation on a DVD jacket means that the entire DVD should be accessible for a deaf consumer unless otherwise

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<sup>239</sup> See *Greater Los Angeles Agency on Deafness*, 742 F.3d 414, 428-31 (9th Cir. 2014) (holding that 1996 Act did not preempt state disability law) (quoting 1996 Act, Title VI, § 601(c)(1) (reprinted in 47 U.S.C. § 152, historical and statutory notes)).

<sup>240</sup> See *id.* at 419.

<sup>241</sup> See Tim Hull, *CNN’s Dispute With Deaf Viewers Unravels*, Courthouse News Service (Oct. 13, 2014, 1:12 PM), <http://www.courthousenews.com/2014/10/13/72389.htm>.

<sup>242</sup> Cal. Civ. Code § 51(b) (2012).

<sup>243</sup> See *Cullen*, 880 F. Supp.2d at 1024 (citing several authorities).

<sup>244</sup> See *id.* at 1024-25; see also *Greater Los Angeles Agency on Deafness*, 742 F.3d at 426-27 (similar).

<sup>245</sup> See *supra* notes 86-91 and accompanying text.

indicated.<sup>246</sup> This should be the basic argument used when suing DVD producers for a failure to caption DVDs.

At least one other captioning lawsuit also attempted to assert state consumer laws for lack of captioning.<sup>247</sup> In *Cullen*, the plaintiffs based their suit on several statements made by a Netflix official that touted the company's future plans to provide captioning access on Netflix's streaming services. The court held in favor of the defendants, determining that the alleged false statements were either literally true, or at most, amounted to "puffery" upon which no reasonable consumer could rely.<sup>248</sup> Thus, there was no violation of state consumer laws.

Whereas the ostensible false statements in *Cullen* amounted to a "plan to provide captioning in the future," the ostensible false statement in *Boltz* amounted to "this DVD is captioned right now." Most deaf consumers check a DVD to see if the "captioned" designation is visible before purchasing or renting the DVD. I certainly do. While federal law does not directly control a state consumer lawsuit against DVD producers, the *Feldman* case established that caption-accessibility includes song lyrics.<sup>249</sup> Studios would have an uphill battle trying to argue that a "captioned" designation on a DVD means "everything except song lyrics."

A consumer suit brought against DVD producers would most likely come as a class action. "[C]lass actions serve an important function in our judicial system" to promote the administration of justice.<sup>250</sup> Any damage sustained by a single plaintiff for failing to caption song lyrics is too small to bother with an individual lawsuit. However, "[b]y establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."<sup>251</sup> There is "a strong presumption in favor" of certification when the alleged wrongdoing is widespread and the alternative to certification "is likely to be no action at all for the majority of class members" as would be the case here.<sup>252</sup>

DVD producers would certainly have several potential defenses to a class action. There could be issues of reliance.<sup>253</sup> While it seems clear that most deaf consumers will rely on a representation that the product is captioned before purchasing

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<sup>246</sup> See *supra* note 87 and accompanying text.

<sup>247</sup> See *Cullen*, 880 F. Supp.2d at 1025-29 (asserting several California consumer claims against Netflix for lack of captioning). One other suit asserted—but ultimately abandoned—state consumer law claims against a DVD rental and retail business for lack of captioning. See *Jancik*, 2014 WL 1920751, at \*10.

<sup>248</sup> See *Cullen*, 880 F. Supp.2d at 1025-29.

<sup>249</sup> See *supra* notes 92-96 and accompanying text.

<sup>250</sup> Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974).

<sup>251</sup> *Id.*

<sup>252</sup> *Cavin v. Home Loan Ctr, Inc.*, 236 F.R.D. 387, 396 (N.D. Ill. 2006).

<sup>253</sup> *Cf. Mazza v. Am. Honda Motor Co., Inc.*, 666 F. 3d 581, 595-96 (9th Cir. 2012) (rejecting nationwide consumer class action based on California false advertising law because, *inter alia*, reliance on advertisements was not shown).



or renting a DVD, there may be some more nuanced inquiries. For example, what if the deaf consumer purchased a later season of a television show DVD without a captioned theme song when the consumer was fully aware that the song was not captioned in earlier seasons?

There may be issues of damages. While a deaf consumer was probably damaged when purchasing a musical that did not caption the songs, the amount of damages is less clear when the song that plays over the closing credits is not captioned. As one court noted, however, “[i]t is well-established that individual questions with respect to damages will not defeat class certification . . . unless that issue creates a conflict which goes to the heart of the litigation.”<sup>254</sup>

In any event, reliance and damages disputes are typically present in any consumer class action. Judges are routinely expected to resolve numerous arcane and difficult disputes.<sup>255</sup> Courts are directed to certify class actions when the question regarding certification is close.<sup>256</sup> Class actions are especially favored when used in the context of a statute that is intended to vindicate the rights of the plaintiffs.<sup>257</sup> Such would undoubtedly be the case in a class action by deaf patrons seeking captions to song lyrics.

## CONCLUSION

While I was drafting this article in Fall of 2014, I rented the fifth season DVD of the television show *Community* (my wife and I are fans of the show). Having previously rented the DVDs of Seasons 1-4 of show, I knew that the producers were part of a long list that did not caption the lyrics for the show’s opening theme song.

Happily, the fifth season DVD was different. For the first time, the lyrics to The 88’s song “At Least It Was Here” were captioned. Perhaps NBC Universal’s lawyers read the *HathiTrust* decision and decided that captioning song lyrics constituted fair use for copyright purposes. Perhaps new lawyers took a fresh look the *Bourne* and *ABKCO* decisions and determined that they were distinguishable from captioning accessibility. Perhaps the lawyers actually talked to the copyright holders of the songs and found out that the holders did not oppose captioning their songs’ lyrics.

<sup>254</sup> *Ansoumana v. Gristede’s Operating Corp.*, 255 F. Supp. 2d 184, 86 (S.D.N.Y. 2001).

<sup>255</sup> *See, e.g., Parisi v. Davidson*, 405 U.S. 34, 52-53 (1972) (Douglas, J., concurring in the result); *see also Barnes v. United States*, 68 Fed. Cl. 492, 501 (2005) (“it states the **obvious** to say that a court should not shy away from a class action simply because it will require more effort than an ordinary individual case”) (citing 7AA Wright, Miller, & Kane, *FEDERAL PRACTICE & PROCEDURE* § 1780, at 199).

<sup>256</sup> *See, e.g., Aliotta v. Gruenberg*, 237 F.R.D. 4, 10 (D. D.C. 2006) (“when a court is in doubt as to whether to certify a class action, it should err in favor of allowing a class”) (citation omitted); *In re Loewen Group Secs. Litig.*, 233 F.R.D. 154, 161 (E.D. Pa. 2005) (“the interests of justice require that in a doubtful case any error, if there is to be one, should be committed in **favor** of allowing a class action”) (citation omitted).

<sup>257</sup> *See, e.g., Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975) (noting that FRCP 23 “must be read liberally in the context of civil rights suits”); *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 357 (E.D. Pa. 1976) (class certification should be “applied liberally . . . so that it may be consonant with the remedial purpose and the therapeutic role of federal antitrust litigation”).

Whatever the reason for the change in captioning song lyrics, it was a very welcome development for me and undoubtedly for other deaf consumers.

Ultimately, film and television producers should realize that the “copyright defense” as a justification for not captioning song lyrics is not tenable. Although the deaf community has seen substantial progress in the past forty years on other fronts, captioning song lyrics is a rare example of where the deaf community would welcome a return to the 1970s-90s era, when song lyrics were generally accessible in captioned motion pictures and television shows.